150 US 520

RECORD, CASE No. 14,635.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~748~~. 471

FRED. H. LONG, APPELLANT,

vs.

JAMES G. THAYER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED MAY 12, 1891.

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1 UNITED STATES OF AMERICA, *sct:*

To James G. Thayer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the western division of the western district of Missouri, wherein Fred. H. Long is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said *plaintiff in error*, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John F. Philips, judge of the circuit court of the United States for the western division of the western district of Missouri, this 18th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

JNO. F. PHILIPS, *Judge.*

2 [Endorsed:] Middlebrook. United States circuit court, western district of Missouri, western division. Jas. G. Thayer *vs.* Fred. H. Long. Citation. Filed ——, 188—. —— ——, clerk. Mathews & Merriwether.

I hereby certify that I have served the within writ by delivering a true copy to Mr. Middlebrook, of the law firm of Hatch & Middlebrook, at Kansas City, Mo., in the western dist., this 25th day of Apr., 1891.

JNO. P. TRACY, *U. S. M.*,
By J. K. SIDDELL, *Dep-ty.*

Marshal's fees, $2.00, paid by appellant.

3 UNITED STATES OF AMERICA, *sct:*

Be it remembered that heretofore, to wit, on the third day of December, A. D. 1888, there was filed in the office of the clerk of the circuit court of the United States for the western division of the western district of Missouri, a bill of complaint in chancery, wherein James G. Thayer was complainant and Fred. H. Long was respondent.

Said bill of complaint is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

JAMES G. THAYER, Orator,
vs. } In Chancery.
FRED. H. LONG, Respondent.

James G. Thayer, a citizen of the State of Kansas, brings his bill of complaint against Fred. H. Long, a citizen of the State of California, and showeth to your honors that heretofore, to wit, on the 22nd day of October, A. D. 1887, said Fred. H. Long filed in this court an action at law in ejectment against Townsend R. Smith, tenant of your orator, to recover the possession of lot number thirteen (13), in block number two (2), in Skiles and Western's addition to the city of Kansas, in Jackson county, State of Missouri; that the value of said lot is over two thousand dollars ($2,000 00); that on the — day of May, 1888, your orator was made party defendant in said cause, same being number 1367 in this court; that your orator has an equitable defense to said cause, which he pleaded in the same, which defense is substantially as follows:

4 Defendant in said case number 1367 (orator herein) avers that plaintiff in said ejectment suit (respondent herein) is the grantee of the sole heirs of W. W. Western, deceased, by deed made, executed, and delivered in ——, 1887; that prior to his death said Western and one H. H. Skiles entered into a contract in writing with your orator; which contract is in words and figures as follows:

KANSAS CITY, MO., *June 13th*, 1870.

Received of James G. Thayer fifty dollars and one promissory note for one hundred and two and $\frac{50}{100}$ dollars, due in three months from date, and one other promissory note, due in one year from date, for one hundred and fifty dollars, with 10% interest, all of the above being in full consideration for lot number thirteen (13), block number two (2), Skiles & Western's addition to the city of Kansas, it being understood and agreed that in case each of the before-mentioned notes are paid at maturity, then Skiles and Western are to give a good and sufficient deed to said lot thirteen (13), block two (2), Skiles & Western's addition to the city of Kansas, but a failure to pay either of said notes at maturity shall forfeit the contract.

H. H. SKILES,
W. W. WESTERN,
By J. F. KINNEY, *Agent.*

Attest: W. C. KINNEY.
J. W. KINGSCOTT.

The original of which contract is now on file with the clerk of this court as a part of your orator's answer in said suit in ejectment and was duly recorded in the office of recorder of deeds in and for Jackson county, Missouri, on the 12th day of April, 1875, in Deed Book "B," # 17, page 604; that respondent purchased said lot from said heirs long subsequent to the recording of said contract;

5 that your orator kept and fully performed all duties and obligations allotted to him to keep and perform by said contract and fully paid off and discharged all and every said note mentioned therein according to their true date, tenor, and effect.

That a short time before the last of aforesaid notes fell due said Western died at Bowling Green, State of Kentucky; that your orator paid said note to J. F. Kinney as the agent of said H. H. Skiles & W. W. Western; that said Western died without making your orator any deed to said land, and said Skiles has made none and will make none.

That on June 13th, 1870, your orator went into possession of said land under said contract of purchase, and has ever since remained in possession thereof in good faith, and has made valuable improvements on said land, not knowing of the existence of any adverse claim until the institution of said ejectment suit; all which facts as above stated fully appear in the answer of your orator to the petition in ejectment filed by respondent as aforesaid; that said action of ejectment is still pending in this court.

That by reason of the rules of law [and equity governing the Federal courts your orator's equitable defense, as aforesaid, cannot properly or lawfully be entertained by your honors sitting as a court of law.

That your orator has no remedy at law and no opportunity there for being heard, as in equity and good conscience he ought to be [& your orator hereby offers to allow judgment to be taken against him in said suit in ejectment should this bill in equity be adjudged insufficient].

That said Western received from said Kinney in his (Western's) lifetime full payment of his (Western's) share of the proceeds of sale of said lot. [Your orator avers that by a partition of proceed-
ing at law in 1873 the legal title to the lot in question was
6 vested in the heirs of said Western and by them conveyed
to respondent. The title of partition proceeding was Western *et al. vs.* Skiles *et al.*, and was adjudicated in the circuit court of Jackson county, Missouri, and said Western heirs thereby acquired the legal title of said Skiles in the lot in controversy.]

In consideration whereof and forasmuch as your orator is without any full, complete, and adequate remedy at law and can only have relief in a court of equity, where matters of this kind are cognizable and relievable, to the end, therefore, that said respondent may, if he can, show why your orator should not have the relief he herein prays—

Your orator prays that a writ of subpœna may issue to respondent, returnable at a day certain, and that said respondent may answer this bill, but not under oath, which is hereby expressly waived.

May it pleasure your honors to grant to your orator, not only the most gracious writ of injunction of the United States of America issuing out of and under the seal of this honorable court, to be directed to the said Fred. H. Long, No. 1367, to restrain him and them from further proceeding at law in said cause against your orator touching said suit in ejectment, but also that the most gracious writ of subpœna of the United States of America be directed to the said Fred. H. Long, thereby commanding him, and at a certain day and under a certain penalty therein to be specified, to be and appear and show cause as above requested.

That the so-called legal title of respondent, Fred. H. Long, in and to the said real estate in Jackson county, Missouri, as hereinbefore described, may be decreed to be held in trust by respondent, Fred. H. Long, for your orator, and for such other 7 and further relief in the premises as to the court may seem just, equitable, and proper, and thus your orator will ever pray.

HATCH & MIDDLEBROOK,
Solicitors for James G. Thayer.

STATE OF MISSOURI,
County of Jackson, } *ss:*

James G. Thayer, of lawful age, being by me first duly sworn according to law, upon his oath says that he is the orator in the above-entitled cause; that the matters and facts averred in the foregoing bill in chancery are true, as he verily believes; and further affiant sayeth not.

JAMES G. THAYER.

Subscribed and sworn to before me this the 3rd day of December, 1888.

WARREN WATSON, *Clerk.*

8 Thereupon an application for a restraining order, as prayed in said bill, was on said day made by the complainants in court, it being an adjourned day of the regular October term, A. D. 1888, thereof, and there was also filed the motion to dismiss of defendants T. E. Matthews and H. M. Meriwether; whereupon the following order was made and entered, to wit:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, October Term, A. D. 1888.

MONDAY, *December* 3, 1888.

JAMES G. THAYER
against
FRED. H. LONG, T. E. MATTHEWS, & H. M. MERRIWETHER. }

The application of complainant for restraining order against the defendants and the motion of defendants T. E. Matthews and H. M. Merriwether to dismiss the bill for want of equity, as to them, coming on to be heard, were argued by counsel and submitted; whereupon the court doth order that the bill of complaint herein be dismissed, as to the said promovents, at the costs of the complainant.

It is further ordered that the said respondent Long, upon the filing of a bond by the complainant in the sum of five hundred dollars, with sureties to be approved by this court, be, and he is hereby, restrained and enjoined from proceeding further in the case at law in this court, No. 1367, wherein said defendant is plaintiff and said complainant is defendant, until the further order of this court.

(Signed) JNO. F. PHILIPS, *Judge.*

9 And on Monday, December 10th, A. D. 1888, the following order was entered of record, to wit:

JAMES G. THAYER
against } 1465.
FRED. H. LONG.

This day comes complainant, by his solicitor, and tenders bond for injunction in the sum of five hundred dollars, which bond is approved by the court and ordered to be filed and made a part of the record herein.

Said bond is in words and figures as follows:

In the Circuit Court of United States for the Westrn Division of the Western District of Missouri. In Chancery.

JAMES G. THAYER, Orator,
vs. } No. —.
FRED. H. LONG, Respondent.

Injunction.

Know all men by these presents that we, James G. Thayer, as principal, and Charles W. Evans and William Todd, as sureties, are hereby bound and indebted unto Fred. H. Long, respondent in the above-entitled cause, in the sum of five hundred dollars ($500); to the payment of which sum, well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators, and assigns.

The condition of the above bond is as follows, to wit:

Whereas James G. Thayer, orator in the above-entitled cause, has procured a restraining order to be issued out of the said court, directed to the said Fred. H. Long, respondent, restraining him from further prosecuting a suit in ejectment, No. 1367, pending in this court, entitled Fred. H. Long, plaintiff, *vs.* Townsend R. Smith and James G. Thayer, defendants:

Now, therefore, if upon the hearing of said injunction proceeding in chancery the said Thayer shall be successful in procuring an injunction against the said Long, enjoining him
10 from further prosecuting said suit in ejectment, or in the event the said Thayer shall not so succeed in so enjoining said Long in said suit, yet if said Thayer in that event shall pay all costs of said chancery proceeding in injunction and pay all damages that may have been occasioned to said Long by reason thereof, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

In testimony whereof we have hereunto set *out* hands and affixed our seals this — day of December, A. D. 1888.

JAMES G. THAYER. [SEAL.]
CHARLES W. EVANS. [SEAL.]
WM. TODD. [SEAL.]

And on Tuesday, December 11th, A. D. 1888, it being a day of said October term, the following further order was made and entered of record, to wit:

JAMES G. THAYER
vs. } No. —.
FRED. H. LONG.

On this day the motion of the defendant, Long, to dismiss the bill for want of equity on its face came on to be heard before the Hon. John F. Philips, judge, etc., but pending the hearing of the motion the complainant (at the suggestion of the court) asked and obtained leave to amend his bill by offering on the face of the bill to confess judgment forthwith in the ejectment suit sought to be enjoined; also by alleging that the Western heirs acquired all the legal title of Henry H. Skiles to the land in controversy under and by virtue of a partition suit styled Western *et al. vs.* Skiles *et al.*, which was determined in the circuit court of Jackson county, Missouri, in 1873; and said amendments being made instanter,
11 the court overruled said motion; and thereupon the restraining order heretofore granted was continued; to all of which the defendant, Long, at the time excepted.

(Signed) JNO. F. PHILIPS, *Judge.*

And said motion to dismiss is as follows:

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri, Sitting in Equity.

JAMES G. THAYER
vs. }
FRED. H. LONG.

Motion.

The defendant, Long, moves the court to dismiss the bill for want of equity on its face.

FRED. H. LONG,
By MATTHEWS & MERIWETHER, *Sol's.*

And afterwards, to wit, on the 31st day of December, 1888, the following interrogatories to J. F. Kinney were filed:

In the Circuit Court of the United States of America for the Western Division of the Western District of the State of Missouri.

JAMES G. THAYER, Orator,
vs. } In Chancery.
FRED. H. LONG, Respondent.

Interrogatories to J. F. Kinney, of Cincinnati, Ohio, on Behalf of James G. Thayer, Orator; Direct.

1st. State your name, age, residence, and occupation.

2nd. State where you resided and did business from June 1st, 1870, to June 30th, 1871, inclusive.

12 3rd. State whether or not during the time you resided in Kansas City, Missouri, you sold lot thirteen (13), block two (2), Skiles & Western's addition to the city of Kansas, to James G. Thayer, orator herein.

4th. If you did sell him said lot, state whether or not you so sold the same as the agent of H. H. Skiles and W. W. Western.

5th. State whether or not you received payment as agent for Skiles & Western of the purchase price of lot 13, block 2, Skiles and Western's addition to the city of Kansas, from James G. Thayer, orator in this cause.

6th. State whether or not (if you did so receive payment) you accounted for and paid to W. W. Western in his lifetime for his part thereof.

7th. Did you ever knowingly receive any payment from Thayer on account of said lot after you heard of Western's death?

8th. Do you know when Thayer went into possession of the lot in question and if he did go into possession under said sale?

9th. If any part of the purchase price due to Western was not paid him, state what amount was so unpaid, if any.

10th. If your answer to the 8th interrogatory is yes, state when, as a matter of fact, Thayer did go into possession of the lot.

11th. If there is any fact or circumstance connected with the sale of this lot to Thayer by you which you desire to state, please do so; state fully.

HATCH & MIDDLEBROOK,
For Thayer, Orator.

13 And afterwards, to wit, on the 15th day of February, A D. 1889, an answer was filed in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri, Sitting in Equity.

JAMES G. THAYER, Complainant,
vs. } No. 1465.
FRED. H. LONG, Respondent.

The answer of the respondent, Fred. H. Long, to the bill of complaint of James G. Thayer filed against said Long in the above-entitled cause.

For answer to so much of said bill as he is advised that it is material or necessary for him to answer, respondent says:

It is true that he brought the ejectment suit mentioned in the bill. It is also true that respondent is the grantee of the only heirs of W. W. Western, deceased, viz., Elgin U. Western and his sister, Lucy Meriwether, born Western, by deed made, executed, and delivered on the 9th day of June, 1887, by which deed the land in controversy was conveyed to this respondent.

Respondent does not know and has no information sufficient to form a belief as to whether or not it is true that prior to his death

said W. W. Western and one H. H. Skiles entered into a contract in writing with complainant Thayer in manner and form as he hath in his bill alleged. Respondent requires proof of the same. Respondent denies that said contract was duly recorded as alleged, and respondent says that it is not true that complainant Thayer kept and fully performed all duties and obligations allotted to him to keep and perform by said contract and fully paid off and discharged all and every said note mentioned in said bill according to time, date, tenor, and effect. Said Western dies about July 9th,
1870. It is not true that complainant paid the last of said
14 notes to J. F. Kinney, as the agent of said H. H. Skiles and
W. W. Western.

It is true that said Western and said Skiles have never made to the complainant any deed to said land, as respondent is informed and believes.

Respondent does not know and has no information sufficient to form a belief as to whether or not it is true as alleged that on June 13th, 1870, complainant Thayer went into possession of said land under said contract of purchase and has ever since remained in possession thereof in good faith and has made valuable improvements on said land, not knowing the existence of any adverse claim until the institution of said suit in ejectment.

It is not true that said W. W. Western received from said Kinney in his (Western's) lifetime full payment of his (Western's) share of the proceeds of the sale of said lot.

It is true that by a partition proceeding in the year 1873 the legal title to the lot in question was vested in the heirs of said W. W. Western and by them conveyed to the respondent, Long. The style of said partition proceeding was Western *et al.* *vs.* Skiles *et al.*, and was adjudicated in the circuit court of Jackson county, Missouri, and said Western heirs did thereby acquire the legal title of said Skiles in and to the lot in controversy.

Respondent further says that the complainant has been guilty of such laches in delaying for nearly nineteen years to take any steps to enforce his alleged claim that he ought to be thereby repelled from a court of equity, and defendant sets up, pleads, and relies upon said laches as a bar to complainant's action.

And respondent further says that he is, under the statutes of the State of Missouri, an innocent purchaser of the land in controversy
in good faith for a valuable consideration and without notice
15 of complainant's alleged rights or claims in or to the same
otherwise than by a certain pretended tax title hereinafter
mentioned, and respondent sets up, pleads, and relies upon the fact that he is, under the statute law of Missouri, an innocent purchaser for value without notice, as aforesaid, of said land in bar of complainant's action.

And respondent further says that after the alleged execution of of said contract, on, to wit, about the 24th day of January, A. D. 1876, the complainant Thayer repudiated and abandoned the same and purchased a pretended tax title on said land, and from that time held and claimed title under his pretended tax title and not under said contract of purchase from Skiles and Western—that is to say, the city of Kansas, State of Missouri, on the 8th day of January, 1876, pretended to sell said lot to F. H. Benson and Sons for for delinquent taxes, interest, and costs, amounting in the aggregate to only $6.21, claimed to be due said city on said lot for the years 1865, 1869, and 1870, and said city, on January 8th, 1876, issued to said Benson and Sons a certificate of purchase at said tax sale of said lot. Just sixteen days thereafter, to wit, on January 24th, 1876, said Benson and Sons assigned said certificate of purchase to the complainant Thayer, and on the 9th day of November, 1877, said city undertook, in pursuance of said certificate, to execute to said Thayer a tax deed to said lot, which deed was, on the same day, filed by said Thayer for record in the office of the recorder of deeds in and for Jackson county, Missouri, and said deed was recorded therein in Book B, No. 27, at page 461.

Respondent further says that taxes for the year 1870 and the interest and costs on the same all accrued after June 13th, 1870, and complainant Thayer was, on his own showing and claim, bound in law and equity to pay the taxes, etc., for 1870, at least, if not
16 for the other two years also; but this he failed and refused to do, and suffered and procured said lot to be sold for taxes as aforesaid, and had the same bought in at said tax sale, for his own exclusive benefit, by his agents, said Benson and Sons, hoping and intending thereby to cut out and destroy all the interests and rights of his said vendors, Skiles and Western, in and to said lot, and thereby free himself, in a wrongful and fraudulent manner, from his obligation to pay the unpaid purchase-money, of which not more than fifty dollars out of the total price of $302.50 had been paid; so that at the time said Thayer took said tax title, which cost him not more than $6.21, as aforesaid, he had in his hands, as trustee for his vendors, Skiles and Western, $162.50 principal and about $120.51 interest thereon—in all, $283.01—of their money. Said Thayer, when sued in ejectment for said lot, as aforesaid, set up and relied upon said tax title, both in his pleadings and in his evidence, in bar of respondent's said action.

The improvements alleged to have been made by said Thayer consist of a small frame tenement house of no great value. It was built after the purchase by him of said tax title and after he had requdiated said contract and was relying upon his pretended tax title for his protection, as respondent is informed and believes.

And respondent insists that the said Thayer, by his said acts, did violence to the fiduciary relations which existed between him and his said vendors, and that he was guilty of fraud, and also that by his said acts he renounced, abandoned, and repudiated said contract. Said Thayer gave notice to respondent's grantors, by recording said tax deed, of his intention to abandon and rescind said contract.

On July 9th, 1870, when said W. W. Western died, his only heirs were two infants of very tender years, residing in the State of Kentucky, the son, Elgin U. Western, being then only four years of age

17 and the daughter, Lucy Western, now Meriwether, being only two years of age. They had no guardian in the State of Missouri until the year 1874, and from that time on they had a guardian residing constantly in the city of Kansas aforesaid. Said W. W. Western died intestate in regard to the land in controversy.

On September 5th, 1886, said Elgin U. Western was 21 years of age, and on December 18th, 1886, said Lucy Western, now Meriwether, was 18 years of age, and within less than one year from said dates and within less than two months from the time they received actual notice of said pretended tax title, to wit, on the 9th day of June, 1887, respondent's said grantors (as they have informed said respondent and as he believes) not only acquiesced in, but actively accepted, said Thayer's abandonment and rescission of said contract, and conveyed said property to respondent. On the 22nd day of October, 1887, respondent brought said suit in eject-ent against said Thayer for said lot. On November 8th, 1888, a jury having been waived, said ejectment suit was heard by this honorable court on the pleadings and proof and was by the court taken under advisement. While said cause was still held under advisement the said Thayer, on December 3rd, 1888, filed his bill in this cause to enjoin respondent from further prosecuting said suit in ejectment, but he has failed and refused, up to the time of filing this answer, to confess judgment in said ejectment suit, as respondent insists that he is bound in equity to do before he has any right to vex respondent with this further suit concerning the same matter, and because he has failed and refused so to confess judgment respondent insists that he should be denied, not only any and all relief, but even a hearing in this cause. Said ejectment suit is still held under advisement by this honorable court.

18 Respondent says that by the terms of said contract, as alleged by the complainant, it is provided that "a failure to pay either of said notes at maturity shall forfeit this contract."

And respondent says that the first of said notes was not paid at maturity, and that the second of said notes was not paid at maturity, and that they both remain unpaid. The value of said lot was rapidly increasing at the date of said contract. The only motive that influenced said Skiles and Western to sell said lot at said time was great need of money just then on their part to pay taxes on their land known as Skiles and Western's addition, as respondent is informed and believes. Said lot has constantly increased in value ever since June 13th, 1870, excepting, perhaps, the years 1873, 1874, and 1875, so that the land unimproved is now worth nearly $5,000.00.

The complainant has for years received and is still receiving large rents and profits from said lot, which have paid him many times over for all that he ever paid out for or on the same in any way whatever, and notwithstanding his fraudulent acts in regard to said tax title he still insists on retaining possession of respondent's said lot and collecting said rents contrary, to conscience, equity, good faith, and honesty.

And now, having fully answered, respondent prays to be hence dismissed with his costs.

MATTHEWS & MERIWETHER,
Solicitors for Respondent.

FRED. H. LONG.

STATE OF CALIFORNIA, }
County of Lake, } *ss:*

On this 8th day of February, 1889, before me personally appeared Fred. H. Long, the respondent in the foregoing answer, and
19 made oath that he has read the above answer subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

RODNEY J. HUDSON,
Judge of the Superior Court, Co. of Lake, State of California.

STATE OF CALIFORNIA, }
County of Lake, } *ss:*

I, W. L. Anderson, county clerk of the county of Lake, State of California, and clerk of the superior court of said county (which is a court of record), do hereby certify that Rodney J. Hudson, whose name is subscribed to the annexed instrument, was at the date of the same and is now the superior judge in and for said county, duly elected and qualified and authorized by law to administer oaths, and full faith and credit are due to all his official acts as such.

And I do further certify that the signature attached to the annexed instrument is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of said superior court, at my office, in the county of Lake, this 8th day of February, 1889.

[SEAL.]

W. L. ANDERSON,
County Clerk,
By R. L. ANDERSON,
Deputy Clerk.

And afterwards, to wit, on the 2nd day of March, 1889, a reply was filed in words and figures as follows, to wit:

20 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

JAMES G. THAYER, Orator, }
vs. } In Chancery. No. 1465.
FRED. H. LONG, Respondent. }

Replication of James G. Thayer, Orator, to the Answer of Fred. H. Long, Respondent.

This replicant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said respondent is uncertain, untrue, and insufficient to be replied unto by this replicant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this replicant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in his bill he hath already prayed.

JAMES G. THAYER, *Orator*
By HATCH & MIDDLEBROOK,
His Solicitors.

And afterwards, to wit, on June 1st, 1889, a motion was filed in said cause in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri, Sitting in Equity.

JAMES G. THAYER, Complainant,
vs.
FRED. H. LONG, Respondent.
} No. 1465.

Motion.

21 And now comes the respondent, Fred H. Long, and on the coming in of his answer to the said bill of complaint and waiving no rights in said suit, *and* moves the court to discharge the order and dissolve the temporary injunction which has heretofore been issued against him in this case.

MATTHEWS & MERIWETHER,
Solicitors for Respondent.

And afterwards, to wit, on the 8th day of July, A. D. 1889, an application for renewal of restraining order was filed in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri.

JAMES G. THAYER, Orator,
vs.
FRED. H. LONG, Respondent.
} No. 1465.

Application for Renewal of Restraining Order.

Now comes James G. Thayer, orator in the above-entitled cause, and shows to the court that heretofore, to wit, on the — day of ——, A. D. 1888, at the —— term, 1888, of this court, he obtained a restraining order from this court while in open session, which order has never been renewed; that said order was granted to restrain the respondent herein from further prosecuting a suit at law in ejectment against the orator in this cause, said suit in ejectment being entitled Fred. H. Long *vs.* Townsend R. Smith and numbered 1367, pending in this court; that your orator, when he procured said restraining order, gave good and sufficient bond to respondent herein to fully indemnify respondent for all damages and costs to accrue by reason of the said issuance of said restraining order; which said bond was filed and approved by this court on the — day of ——, A. D. 1888, and is now on file in this court.

22 That testimony on the part of your orator has been taken in this cause and interrogatories and cross-interrogatories filed for the taking of testimony on the part of the respondent, which testimony has been returned into court and is now on file here, in so far as the testimony of your orator is concerned, but the respondent has not yet filed any testimony on his part.

Wherefore your orator applies to the court to continue said restraining order, and enter an order of court to that effect, until the next term of this court or until the said suit in equity to restrain respondent from proceeding at law with his said suit in ejectment is finally determined.

HATCH & MIDDLEBROOK,
For JAMES G. THAYER.

Said order is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

MONDAY, *July 8th, A. D.* 1889.

JAMES G. THAYER
against } 1465.
FRED. H. LONG.

Upon the application of complainant it is ordered that defendants refrain from the acts and doings complained of in the bill of complaint herein, and that they be restrained from taking any further steps or proceedings in the prosecution of the suit at law in this court of Fred. H. Long *vs.* Townsend R. Smith *et al.* until the further orders of this court.

(Signed) JNO. F. PHILIPS, *Judge.*

And afterwards, to wit, at the regular September term, A. D. 1889, and on Friday, September 20th, the following decree was filed and entered of record, to wit:

23 UNITED STATES OF AMERICA,
Western Division of the Western
District of Missouri, } *sct :*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, September Term, A. D. 1889.

FRIDAY, *September 20th.*

JAMES G. THAYER
ag'st
FRED. H. LONG. } 1465.

This cause having been heretofore submitted on the motion to dissolve the injunction herein and on the pleadings and the proofs and taken under advisement, it is now ordered, adjudged, and decreed as follows:

1. That the motion to dissolve the injunction herein be, and the same is hereby, denied.

2. That upon the payment by complainant into the registry of this court of the sum of one hundred twenty-six & $\frac{25}{100}$ dollars, with interest, at ten (10) per centum per annum, from June 13th, 1870, within sixty (60) days from this date the injunction heretofore granted herein shall be, and is hereby, made perpetual.

3. That the said defendant shall place in the registry of this court for the benefit of complainant proper deeds conveying the interests of the Western heirs and a quitclaim of his own interest in the property in controversy to said complainant within ninety (90) days from this date, and on failure thereof the said complainant shall recover costs herein; otherwise the defendant shall recover costs.

4. That an appeal is allowed on the prayer of the defendant to the Supreme Court of the United States and the penalty of 24 the bond therefor fixed at $500.00, to operate as supersedeas of all save the order of injunction.

(Signed) DAVID J. BREWER,
Circuit Judge.

25 The following evidence was offered on the trial of said cause on the behalf of the complainant and the respondent, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri.

JAMES G. THAYER, Orator,
vs.
FRED. H. LONG, Respondent. }

Stipulation Waiving Formalities in Taking Testimony.

It is hereby agreed that all formalities as to issuing dedimus, serving of notice to take depositions, and all exceptions as to time and all other exceptions which relate merely to procedure are hereby expressly waived.

MATTHEWS & MERIWETHER,
Sol's for Def't,
By T. E. MATTHEWS.
HATCH & MIDDLEBROOK,
For James G. Thayer.

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *sct:*

I, John M. Parry, a notary public within and for Jackson county, Missouri, do hereby certify that under and by virtue of the several acts of Congress authorizing and regulating the taking of depositions *de bene esse* in civil causes depending in the courts of the United States I caused to come before me, in my office, in the custom-house, in Kansas City, Jackson county, Mo., on the 16th day of March, A. D. 1889, and between the hours of nine o'clock a. m. and five o'clock p. m. of that day, the following persons, to wit, James G. Thayer, Joel F. Kinney, and Charles W. Evans, to be examined as
26 witnesses on the part of the complainant in a certain cause depending in the circuit court of the United States for the western division of the western district of Missouri, wherein James G. Thayer is complainant and Fred. N. Long is defendant.

JAMES G. THAYER, being duly sworn, testified as follows:

Direct examination by Mr. MIDDLEBROOK:

Q. State your name and your residence and occupation.

A. My name is James G. Thayer; residence, Atchison, Kansas. I am a carpenter by trade.

Q. State whether or not you are in possession of lot 13, block 2, Skiles & Western's addition to the city of Kansas, in Jackson county, Missouri.

A. I am in possession of that lot.

Witness here handed contract in writing, dated Kansas City, Mo., June 13th, 1870, and forming a part of the separate answer of James G. Thayer in case No. 1367 in the circuit court of the United States for the western division of the western district of Missouri, being the action at law sought to be enjoined by this proceeding in chancery.

Q. You may examine that contract and state who signed it.

A. It is signed H. H. Skiles and W. W. Western, by J. F. Kinney, agent.

By Mr. MIDDLEBROOK: We now offer to file as an exhibit in this case all the pleadings in case No. 1367, including this and other exhibits introduced in that case.

Q. Mr. Thayer, are you able to identify that contract as being the one referred to in this case?

Ans. I am.

Q. State whether or not it is the contract referred to.

A. It is.

27 Q. Did you have that contract recorded? If so, when and where?

A. Filed for record on the 12th day of April, 1875, at 10.45 a. m., Book 17, page 604, in the office of the recorder of deeds for Jackson county, Missouri. I gave the paper to Mr. Vincent, with the necessary fee, and asked him to have it recorded, which he did.

Q. State whether or not you made the payments provided for in the contract in evidence which, by the terms of that contract, you agreed to make.

A. I did.

Q. State whether or not you went into possession of lot 13, block 2, Skiles & Western's addition; and, if so, when under this contract.

A. I did; within ten days after June 13th, 1870.

Q. In what way did you go into possession?

A. By putting lumber on the ground and digging a cellar for a house.

Q. State whether or not you have remained in continuous possession of that lot from that time until now.

A. I have.

Q. What improvements, if any, have you placed upon the lot?

A. A dwelling-house and the necessary outbuildings, cistern, &c.

Q. Are these improvements the same ones that you have just referred to when you say you commenced digging the cellar and carrying the lumber on the lot?

A. They are.

Q. When did you first hear of any claim being made by the respondent or any one else adverse to you?

A. I cannot state the date; some time during 1888.

Q. Who was Townsend R. Smith, the defendant in ejectment suit No. 1367?

28 A. A tenant of mine on the premises.

Q. Have you paid any taxes on that lot since you have been in possession?

A. I have paid or had paid through agents all taxes up to the present time, both regular and special taxes.

Q. State whether or not at the time you made these improvements you knew of the existence of any adverse claims against that lot.

A. I did not.

Q. State whether or not you lay claim to this lot under the contract in evidence.

A. I do.

Q. State at the time you made these payments under this contract whether you made them in good faith for the purpose of acquiring the title and ultimately getting the deed.

A. I did.

Q. How much money have you paid out in all on the purchase price of that lot?

A. $317.50.

Q. State at what times and in what amounts you paid that sum.

A. I paid $50 when I received this contract from the hands of J. F. Kinney. I paid $102.50 on September 13th, 1870, as per receipt, against note. I paid $165 on June 13th, 1871, as per note of $150, with 10 per cent. interest.

Q. State whether or not these are the notes referred to in the contract.

A. One note is; the other is the receipt against the note.

Q. How did you come to get the receipt against the note instead of the note itself?

A. J. F. Kinney claimed to have lost or mislaid the note and gave me a receipt.

29 Q. In what capacity was Mr. Kinney acting when he had the transactions to which you have testified with you?

A. To the best of my knowledge, he was acting as the agent of Skiles & Western.

By Mr. Middlebrook: We offer in evidence a copy of the power of attorney from W. W. Western, Juliette U. Western, his wife, to J. F. Kinney, dated June 23rd, 1869, and recorded July 12th, 1869, in Book 70, page 86, in the office of recorder of deeds for Jackson county, Mo.

By Mr. Matthews: The copy of power of attorney is objected to by respondents on the ground that it is not properly certified, but it is agreed that this objection shall be waived if the complainant shall have the power of attorney properly certified before it shall be used in court for any purpose.

(Copy power of attorney hereto attached, marked Exhibit "T.")

Q. It is averred in the respondent's answer in this case that you made the improvements and built the house on this lot after a certain tax sale referred to in the answer had been made. State whether or not that is a fact.

A. It is not.

Q. What rental income do you receive per month for this place?

A. $9 per month when the property is occupied.

Q. How long have you been receiving that?

A. I have been receiving that and more since some time during July or August, 1870.

Q. What is the value of the property?

A. Between four and five thousand dollars.

Q. Do you mean the value now, Mr. Thayer?

A. To the best of my judgment.

Q. It is set out in the answer of respondent that property commenced increasing at once after you bought it in value, and steadily increased ever since. You may state whether or not that is so.

30 A. It is incorrect. In 1876 it could have been bought for half the money I paid for it.

Q. How many years have you paid taxes on that property?

A. 18 years.

Q. How much per year have the taxes been for the last five years—the general taxes?

A. I cannot state that with any accuracy.

Q. What became of the receipts showing the payment of the taxes?

A. They are mislaid and cannot be found, other parties having taken some of the receipts.

Q. State whether or not it was at your instance and request that the taxes were paid.

A. It was.

Q. It is averred in the respondent's answer that for the purpose of perpetrating a fraud upon the grantors of the respondent and with a view of doing violence to the fiduciary relations alleged by the respondent to exist between you and the heirs of Western, that you colluded and conspired with Benson & Son to procure a sale and a tax title of this lot, intending thereby to defraud and cheat the heirs of Western out of their just rights. State whether or not that is true and whether or not in that way or in any other way you have endeavored to perpetrate a fraud upon the heirs of Western or upon this relator.

A. I have not.

Q. It is averred in the answer that you have been guilty of laches in delaying for 19 years to take any steps to enforce this contract or your rights under it. You may state how it happened that you never have brought any suits or proceeding.

A. I went into possession of this place under this contract, paid
my money as per agreement, and the validity of it was never
31 questioned until some time, I think, in 1888—I believe it is
1888—and for that reason I never pushed the claim, believing mine to be a good and valid claim.

Q. State whether or as soon as you did discover that there were adverse claims to this lot you did then take these legal steps to assert your rights.

A. As soon as learning of those adverse claims I went to the office of Matthews & Meriwether and exhibited this contract and papers and asked them what claim they thought they had on the lot. They claimed that they had assigned away all their claim—the heirs had—to a party by the name of Long, and as they were not disposed to do anything in the matter, I then employed Hatch & Middlebrook within an hour to prosecute my claim.

Q. State when and how you came to find out that Matthews & Meriwether, as attorneys for Long, had made any formal claim in the way of a suit or otherwise to this lot.

A. A copy of one of the Kansas City papers was sent me containing a notice wherein the C., K. & N. or Rock Island railroad had entered condemnation proceedings on lot 13, block 2, Skiles & Wester*b*'s addition against James G. Thayer, Fred. H. Long, and the Western heirs. That was my first notice of any claim against the lot since I made this contract that was adverse to mine.

Q. Who sent you that notice?

A. I think it was my brother-in-law, C. W. Evans.

By Mr. Middlebrook: I now offer in evidence as an exhibit the newspaper notice referred to in the above answer of the witness.

(The same is hereto attached and marked Exhibit A.)

32 Q. State, if you can, when you received that newspaper notice.

A. It was a few days previous to the day set for the hearing. I came here a few days before the day set for hearing.

Q. It is averred in the answer that Skiles & Western were very hard pressed for money at the time the sale was made to you. You may state whether you knew that to be a fact, and you may also state in the same connection whether the price you paid by the terms of the contract in evidence was a fair and reasonable valuation of the property.

A. I knew nothing of the financial condition of Skiles & Western. The price I paid I considered was the highest that was paid for any property in that locality at that date, if I am correctly informed. I considered it $50 more than the lot was worth at the time.

By Mr. Middlebrook: We offer in evidence the note dated Kansas City, June 13th, 1870, made by James G. Thayer, payable to J. F. Kinney or bearer for $150, due one year after date; also a receipt for $102.50, dated Kansas City, September 13th, 1870, to apply on note dated June 13th, 1870, the same being the receipt referred to by the witness in his testimony as being the receipt against the note for the same amount mentioned in the contract.

Q. Do you remember to whom the note that was lost was made payable?

A. I cannot state positively, but I think it was the same as the other in everything but the amount and date of falling due.

By Mr. Middlebrook: We offer in evidence the contract given by Mr. Skiles & Western, per Kinney, to James G. Thayer, dated June 13, 1870, together with the receipt on the back of the same, signed by J. F. Kinney, for $267.50 in full of all moneys due
33 on the within contract; also the recorder's certificate on the
back thereof, showing when and where the contract was placed of record.

Cross-examination by Mr. Matthews:

Q. In whose possession did the contract under which you claim remain from its date down to the commencement of this litigation?

A. It really was in my possession; for a certain time direct, then in my mother's care, and for the last four or five years again in my personal possession.

Q. It was never left in Kinney's possession, was it?

A. No, sir. I received it from his hands and he never touched it afterwards, excepting to put this receipt on it.

Q. Was the receipt on the back of the contract given at the time the money was paid?

A. We had some words about his inability to make a deed. The receipt was given at the time the money was paid.

Q. As I understand your answer, then, the receipt for $267.50 on the back of the contract was given at the time you made the last payment to Kinney as the agent of Skiles & Western and evidenced the final settlement between you and him? Is this correct?

A. No, sir. It was a final settlement, so far as the money was concerned.

Q. What yet remained unsettled?

A. The fulfillment of the contract on the part of Skiles & Western.

Q. You say that you & Kinney had some words about his inability to make a deed. Why was he unable to make a deed?

A. Because he informed — about the time I laid the money
34 on the desk that Western had died, and he couldn't make
a deed for a dead man. This was at the time of the last payment.

Q. You stated to the court when you were on the stand as a witness in the ejectment suit, did you not, that you were informed of Western's death before you actually made the last payment?

A. I did. I took the money in my pocket from bank, also this contract, and told him that I wanted the fulfillment of this contract, and took the money in my hand or laid it on the desk and handed him the contract. Then the words began about the deed. The money was still in my power and not paid; it was either in my hand or on the desk. It was really not paid when Kinney informed me of Western's death.

Q. Why did you get Benson & Sons to purchase the property for you at tax sale on January 24th, 1876?

A. I didn't get Benson & Son to purchase that for me on January 24th, 1876.

Q. I show you a city tax deed from P. M. Choteau, city collector of the city of Kansas, to James G. Thayer, purporting to convey this lot 13, block 2, dated Nov. 9th, 1877, purporting to be in pursuance of a purchase by Benson & Sons at a tax sale on January 8th, 1876, and assigned by them to you about 16 days thereafter, to wit, on January 24th, 1876, and ask you if you can identify said deed as being the same relied on by you in your pleading and evidence in said ejectment suit, No. 1367, in this court.

A. I believe that is the deed I furnished by attorneys. That is the same deed.

Q. You bought the tax title, then, from Benson & Sons, did you?

A. Yes, sir.

35 (Tax deed above mentioned offered in evidence.)

Respondent further offeres in evidence all the papers in said ejectment suit.

Q. What did you pay Benson & Sons for the tax titles?

A. I paid the money that they paid and legal interest. I don't remember the amount.

Q. In regard to the taxes paid by you on said property, have they been large or small?

A. I have never considered them unreasonable. I can't say from memory what they were, and haven't got the receipts. To the best of my knowledge, they ranged from nine to thirty dollars a year.

Q. How often have they gone as high as thirty dollars a year?

A. I cannot state, if ever.

Q. Please approximate as nearly as you can the average amount of yearly taxes paid by you.

A. As stated in direct examination, I cannot give any definite information in this line for reasons stated in direct examination. For 17 years the income has been handed to me from a second party—that is, from an agent who paid taxes and furnished me statements from time to time. I have simply compared the last statement with the previous one.

Q. What was the actual cost to you of the improvements which, together with the lot, rent for $9 per month and more, as you have stated?

A. The first cost was in the neighborhood of $490—about that—outside of some labor that I put on it myself nights and mornings.

Q. What was the highest monthly rent that you have received for this property, and for how long did you receive it?

A. $12 per month for 24 months. That's the longest I know of and the highest rent.

Q. What would be a fair average rent received by you?

36 A. I presume about $10 a month would be a fair average—that is, while the house was occupied, shutting out the time when it was unoccupied.

Q. Let me see if I understand you. Had the house been occupied all the time, then the average rent would have been higher than $10 per month; but taking the facts as they are, $10 is a fair average. Is that correct?

A. No, sir. For the time the house was occupied it would probably average ten dollars a month. In other words, it rented for nine dollars a month for more months than it did for twelve.

Q. What was the longest period of time during which the house remained vacant?

A. I cannot state.

Q. Please approximate it.

A. I cannot approximate it. The house would stand idle from ten days to three months at a time. There was 17 years or thereabouts that I had no direct personal connection with it.

Q. Who were your agents that collected your rents during this 17 years?

A. First, C. W. Evans; second, my mother, and lately Harrison and Platt.

Q. Do you know whether their books will show about these rents?

A. I presume Harrison & Platt's will. I don't think the other parties' will.

Redirect examination by Mr. HATCH:

Q. At the time Mr. Kinney made this receipt on the back of the contract, was the $267.50 paid or had it been paid prior to that time?

A. It had been paid in accordance with the note and the receipt.

37 Q. What evidence of title did you receive from Benson & Sons; was it simply a tax certificate?

A. It was an assignment of their tax certificate, I believe.

Q. Was the information that you received from Kinney at the time you made the last payment the first information you had of Western's death?

A. It was.

Q. At the time you made this last payment did you know where Western resided?

A. I did not. I never knew where he lived, excepting that it was in Kentucky.

Recross-examination.

By Mr. MATTHEWS:

Q. Outside of the old note for $150, dated June 13th, 1870, and the receipt for $102.50, dated September 13th, 1870, and the receipt on the back of the contract for $267.50, have you any recollection as to the exact dates of your several payments of money to Kinney after these 17 or 18 years, or do you rely upon those papers to furnish the dates?

A. I rely first on the contract for the first date, and this being my first and only transaction in that line at that time I have a positive recollection of paying the money named in that contract on the dates referred to, between the hours of 12 and 2 o'clock—about half-past one, I guess.

Q. Do you mean by the dates referred to those mentioned in the receipts and the notes?

A. The dates in the contract—three months after date and one year after date, to the best of my knowledge.

Q. Did you go back to Kinney several months after making the last payment and get him to endorse the receipt for $267.50 on the back of the contract; and, if so, why did you delay so long to take your receipt?

38 A. I have no recollection of doing so.

Q. Then you paid the last money on August 14th, 1871, as the receipt states? Is this correct?

A. I paid it on the 13th day of July, 1871.

Q. Why was the receipt dated one month and one day forward, can you explain?

A. I cannot, if it is so dated.

JAMES G. THAYER.

Subscribed and sworn to before me this 16th day of March, A. D. 1889.

JOHN M. PARRY,
Notary Public, Jackson Co., Mo.

Now, on this 26th day of April, 1889, the further taking of these depositions was, by consent of parties, continued as follows:

JOEL F. KINNEY, being duly sworn, testified as follows:

Direct examination.

By Mr. HATCH:

Q. 1. State your name, age, residence, and occupation.

A. Joel F. Kinney; my age is nearly 49 years; my residence, Cincinnati, Ohio; I am an attorney-at-law by profession.

Q. 2. State where you resided and did business during the years 1869, 1870, and 1871, inclusive.

A. In Kansas City, Mo.

Q. 3. State whether or — during the time you resided in Kansas City, Mo., you sold lot 13, block 2, Skiles & Western's addition to the city of Kansas, to James G. Thayer.

A. I think I can state that I did. I have a recollection of selling a lot to him and I have seen the contract here, which is in my handwriting, which I made with him for lot 13, block 2.

39 Witness is here handed the contract introduced in evidence in the deposition of James G. Thayer, being the contract of purchase under which Mr. Thayer claims title in this case.

Q. 4. Please examine that contract and state whether or not it is the contract under which the sale you spoke of in your last answer was effected.

A. It is.

Q. 5. In what capacity were you acting at the time of the sale?

A. I was acting as attorney-in-fact for W. W. Western, with full authority to sell and dispose of this and other property, with verbal authority from H. H. Skiles to sell and dispose of his half interest in the same property, for which he was to make deeds.

Q. State whether or not you received payment, as agent for Skiles and Western, of the purchase price of lot 13, block 2, Skiles & Western's addition, from James G. Thayer, orator in this case.

A. I did receive pay in full for said lot.

(Witness is here handed for inspection the paid note, dated June 13, 1870, for $150, due one year after date, signed by James G. Thayer and heretofore introduced in evidence in this case as a part of the record and papers in the ejectment suit.)

Q. 7. Can you explain how the note which you have examined was made to the order of yourself instead of to the order of W. W. Western?

A. Mr. Western had borrowed money from me previous to this and at this time was indebted to me, and I suppose I took it to myself, crediting him with the amount.

Defendant Long objects to this answer just above on the ground that the witness'*es* suppositions are not evidence.—Matthews & Meriwether, sol's for def't.

(Witness is here handed receipt for $102.50, dated Kansas City,
Mo., Sept. 13, 1870, to apply on note dated June 13th, 1870,
40 given to James G. Thayer, and signed H. H. Skiles and W.
W. Western, per Kinney, already in evidence as a part of the
record in the ejectment suit.)

Q. 8. Please state, if you can, why you gave Mr. Thayer the receipt for that amount of money named in that receipt, instead of giving him the note for that amount mentioned in the contract.

A. I can't call to mind the transaction and I can't tell why the note wasn't delivered up.

Q. State, if you can, whether or not the note mentioned in that receipt was paid to you by Mr. Thayer—the face of the note.

A. I have no doubt but what it was paid, as this receipt evidences. I also see that I have endorsed in my own handwriting on the back of the contract that payment was made in full, which would include this note.

The defendant, Long, objects to the answer of the witness last given on the ground that it is manifest that the witness is giving merely his inferences or conclusions, and not facts. See to Q.'s & Ans. 21 & 22.—Matthews & Meriwether, for def't.

Q. 10. From your recollection of this transaction—the making of this contract and the giving of these notes—can you state whether or not against which this receipt you have examined was given was made payable to J. F. Kinney or bearer, like the one already in evidence?

A. I cannot answer that from recollection, but I have no doubt it was.

This answer objected — by defendant, because it is a mere conclusion, inference, or argument, and not a statement of facts.—Matthews & Meriwether, for def't.

41 Q. 11. State whether or not you credited Mr. Western with
the proceeds of these notes on the account as it existed at the
time this transaction occurred between you and him.

A. I have no doubt but what I credited him with these notes, but I have no distinct recollection of the transaction now. It has been too long ago.

This answer No. 11 objected to on the ground that it is a mere inference or conclusion.—Matthews & Meriwether, sol's for def't.

Q. 12. State whether or not at the time you received the money on this contract and at the time the notes were paid Mr. Western was indebted to you.

A. 12. He was. This matter had passed out of my mind for a number of years, and my books had been lost or destroyed, when I received several letters from various parties in relation to it; and last November I was called on to give testimony in the case between Skiles and Western's heirs, but not having my books or accounts I testified wholly from my memory, but, by chance, within a week last past I came across quite a number of letters from Skiles and Western, which have refreshed my memory as to that whole transaction and changed my recollection of events to some extent, and the statement I make now may be in conflict with something that I wrote or testified to last November.

(Witness is here handed letter dated Bowling Green, Kentucky, March 15th, 1870, addressed to the witness and signed W. W. Western.)

Q. 13. Please examine that letter and state, if you know, who wrote it and whose signature it bears.

A. It is in the handwriting of W. W. Western, whose signature it bears, and was received by me in due course of mail a few days after its date.

(Letter introduced in evidence, marked Exhibit " B," and hereto attached.)

42 Witness is here handed a letter dated Bowling Green, Ky., Aug. 6th, 1870, addressed to the witness, and signed Warner Underwood, administrator of W. W. Western, deceased.

Q. 14. Please examine that letter and state under what circumstances that happened to be written, if you know.

Objected to and question withdrawn.

Q. 15. State whether or not you made any effort to take out letters of administration on the estate of W. W. Western.

A. I was advised by H. H. Skiles to take out letters of administration on the estate of Mr. Western, as a creditor, and wrote to Mrs. Western in regard to it. I went no farther than that.

(Witness if here handed letter dated Bowling Green, Ky., Aug. 6th, 1870, addressed to him, and signed Warner Underwood, administrator of W. W. Western, deceased.)

Q. 16. Please examine the letter and state if you received the same, and, if so, from whom.

A. I received the same in due course of mail, and took it to be an answer — which I had written to Mrs. Western, to which I have referred.

(This answer, No. 16, objected to by defendant on the ground that it is a mere inference, argument, or conclusion of the witness.—Matthews & Meriwether, sol's for def't.)

Q. 17. You may state why you did not take out the letters of administration.

A. Because the administrator had advised me that Mrs. Western preferred that I should not do so.

By Mr. MATTHEWS: Defendant objects to the foregoing question and answer on the ground that they are incompetent and irrelevant.

By Mr. MIDDLEBROOK: We now offer in evidence letter referred to by the witness, handed him for identification, as noted above.

(Letter marked Exhibit " E " and hereto attached.)

43 By Mr. MATTHEWS: The defendant Long objects to the introduction of the letter in evidence because its authorship is

not proven and because, further, that neither Mrs. Western or said Warner Underwood are privies to the defendant Long, and nothing that they could say or write is evidence against said defendant in this case.

Q. 18. State, if you can, when Mr. Thayer went into possession under the contract of purchase in evidence.

A. My recollection is that he took possession at once and put up a house there at once. I know there was a house there a short time afterwards.

Cross-examination.

By Mr. Matthews:

Q. 19. Please state when and how you first received notice of Mr. Western's death.

A. I received it by letter from Mr. Skiles, dated July 14th, 1870; which letter was received by me in due course of mail a few days after its date.

Q. 20. You have stated in your examination-in-chief that James G. Thayer paid you in full for lot 13, block 2. Will you please give the dates and amount of the several payments and how you arrive at them?

A. I arrive at the dates and amounts of these payments from the three documents already in evidence, namely, the note, the receipt for $102.50, the note for $150, and the receipt in full signed by me, dated August 14th, 1871, for $267.50, which embraces the note and receipt, evidently.

Q. 21. Did you infor- Mr. Thayer that Western was dead at the time that you gave him the receipt for $102.50, on Sept. 13th, 1870?

A. I could not tell what I may have said to him, as I have no recollection of the transaction at that time.

44 Q. 22. To refresh your memory, I will state that Thayer testified in substance in his deposition that you told him that Western was dead before he made the last and final settlement and paid the note of $150, but that you did not tell him before he paid the $102.50. What have you to say to that?

A. The receipt for $102 is given by my brother, who was in partnership with me and authorized to do business for me in my absence, and evidently I was not present at the time, or I would have attended to it myself.

Q. 24. You will please state how Mr. Western was indebted to you at the time of his death—whether by note or open account.

A. It was by open account. I would like to give a statement of that transaction as I now recollect it. When I was employed by Skiles & Western I at first advanced money for the surveying and laying out, platting, and recording this addition. I think that neither Skiles or Western had any spare money at that time. Mr. Skiles returned home about this time and I advanced some money to him—I think $225—when he went home. Mr. Western owed some debts here, and I think the first advance I made to him was $500 to pay up some indebtedness, and he remained here nearly a month or more, perhaps, during which time I advanced him nearly a thousand dollars more—to him and his wife. The receipts in part for this money were made exhibits by me in my testimony given in November in the case of Western *et al. vs.* Skiles *et al.*, in this court. Those receipts misled me to a certain extent as to the amount. Later I tried to get Mr. Skiles to assume one-half of this indebtedness and let me keep all the money for sales and apply it on this indebtedness, to which he declined. He permitted me to keep it, but said I must collect of Western himself. I found after Western's death that the whole sales amounted to more than I had advanced to both of these parties together, leaving me in debt to Skiles, and Western in 45 debt to me, and this balancing of indebtedness lead me into error in my former testimony in the other suit in thinking that Mr. Western was about even in his accounts.

Q. 25. Was this $500 advanced at one time?

A. It was. I think that was the first account I had with him.

Q. 26. I understand you to say that about $1,000 was advanced at another time. Was that all in one sum, too?

A. No; that was in various sums, something less than $1,000, and there was also money sent to him after he went home by me, and also there was money sent to Mr. Skiles.

Q. 27. I here hand you what purports to be a leaf from an old book of yours, filed as Exhibit "4" to your former deposition in the case of Western and others *vs.* Skiles, No. 1362, which is as follows:

Skiles & Western, Dr.

	O'Flaherty	$12	
	Recorder	19 20	
	Stamps	10	
	H. H. Skiles, cash	150	
			$191 20
July 7.	W. W. Western	100	
" 11.	" "	25	
" 22.	" "	100	
" "	" "	25	
Aug. 4.	" "	100	
" 6.	" "	100	
" 8.	" "	100	
" 18.	" "	50	
			600 00
" 21.	" "	10	
" 24.	" "	50	
" 26.	" " order	10	
" 30.	Mrs. " cash	100	
" 30.	" " order	45	
			215 00
46 Aug. 30.	H. H. Skiles, draft and exchange	200 50	
	Stamps	9	
	Skiles, cash		
Feb. 5.	" "		
	Abstract of title	7 50	

I ask you to please compare the copy of the account as made just above by the notary and say whether he has copied it correctly.

A. I have compared it and it appears to be correct.

Q. 28. Have you any other book, paper, memorandum, or account from which you can make a more extended statement of this account or of the account between yourself and W. W. Western as it existed at the time of his death?

A. I have no other book account, but since giving that testimony I have found various letters from Skiles—a number from Western—which have refreshed my memory as to the accounts very much.

Q. No year is given on the account as copied as above, but the words July and Aug. appear near the top of the account, and the word Feb. 5 on the last line but one. Can you supply the years to which those entries relate, from your memory or otherwise?

A. The year was the year this subdi*c*ision was laid out. It was in 1869—that is to say, the entries down to Feb. were in 1869, and the entry dated Feb. 5 was probably in 1870.

Q. Please extract from the letters that you have mentioned any items which relate to the account between you and Western at the time of his death, and then file the letters themselves as exhibits to and part of your answer.

A. Here is a letter from H. H. Skiles, dated August 3rd, 1870, in which he says: "I will see Mrs. Western before I start and tell her that Western was indebted to you and that you had better administer." This refreshes my memory as to the continuation
47 of the correspondence with Skiles, in which I had insisted upon his assuming out of his share of the proceeds of the sales a part of the money which I had advanced to Western.

(Letter marked Exhibit "F" and hereto attached.)

This answer No. 30 and the letter marked Exhibit "F" are objected to by defendant on the ground that the answer does not respond to the question and both it and the letter are *o*rrelevant and immaterial.—Matthews & Meriwether, sol'*d* for def't.

A. (continued). Here is another letter from W. W. Western, dated Bowling Green, Ky., Oct. 23, 1869, in which he says, "Go on selling and give warranty deeds," and also in the letter marked Exhibit "D," dated Bowling Green, Ky., March 15, 1870, in which he says, "I have sent Mr. Bower a statement of our title which I wish you to see and satisfy yourself that our title is good. I also wish you to distinctly understand that we hold ourselves indebted to you for any advances you have made or any sum we may owe you—that you shall be fully paid and satisfied—and hope you will still continue to be our agent." These letters bring to mind the facts as they then existed and the substance of letters to these parties to which these letters are answers.

(Letter dated October 23rd, 1869, above referred to, is hereto attached and marked Exhibit "G.")

The last above objection is made to the whole of answer No. 30, and also to the letter marked "G."—Matthews & Meriwether, sol's for def't.

48 Q. 31. Are these letters all the papers or memoranda in your possession or power which in any way refer to the above account?

A. I have other letters here from H. H. Skiles referring to the business which I had in hand for him and Western which tend to refresh my memory as to the facts as they existed at that time, but not directly bearing upon these accounts.

Q. 32. Will you please proceed to state the itemized account as it existed between you and Western at the time of his death, and stating also whence you derive each item, whether from any written matter or from memory alone or from memory aided by written matter, and state what the written matter is in each instance.

A. I am wholly unable to state either the debit or credit account in itemized form. I am testifying from my memory of the events, aided by the letters and memoranda that I now have.

Q. 33. Was the leaf of the old book copied above in your handwriting?

A. It is.

Q. —. As I understand you, that was the only book account that you kept against Western. Is this correct?

A. No, sir; it was not. I had a regular book account which I kept with him, which book is lost. That memorandum is but an account, probably made up at that time, of the small accounts which I intended to take a receipt for in whole—covering the whole.

Q. 35. I ask you now to file every document or paper in your possession relating directly or indirectly to this business and all of the letters which you have referred to and claim to have refreshed your memory with.

A. I have ten letters here, I think, all from Skiles.

(Letters introduced, marked Exhibits "H," "I," "J," "K,"
49 "L," "M," "N," "O," "P," & "Q," and hereto attached.)

A. (continued). These are all the documents I now have.

Q. 36. Referring to your old book account, I will ask you what the first item means—"O'Flaherty, $12"?

A. I think that is to pay Mr. O'Flaherty, the surveyor, for platting the addition. I think there was another bill in which I paid him for surveying it.

Q. Please state the amount of that other bill as nearly as you can.

A. My impression is that it was $32.

Q. What does the second item mean—"Recorder, $19.20"?

A. That, I think, is to pay for recording the plat of the addition.

Q. 39. There are two items of stamps, one for $10 and one for $9. What do these items mean?

A. I think they refer to revenue stamps that were used in their behalf.

Q. 40. The items charged against Western individually on that account, including the item of $100 cash to Mrs. Western, foot up $815, and you have stated in your examination-in-chief that you advanced the $1,000 that you have spoken of or something less than $1,000, to use your exact language, in various sums and not in one lump. I suppose that the various sums making up this $815 are the sums to which you refer. Am I correct?

A. They are; although they may have been, and I think were, something in excess of what is put down there, as I think there were some sales made while he was here, and the money received was in part given to him, which is not mentioned in that statement.

50 Q. 41. That, as I understand, is your general impression now, without having any entry or writing on the subject. Is this correct?

A. Yes, sir; if I could see the dates of the deeds it would aid me in recollecting the facts.

Q. 42. The $500 first advanced I do not see charged on the account. Is it not your recollection that that $500 was paid back through sales made before Western left here, late in the summer of 1869, to return to his home in Kentucky?

A. I think it may have been; I could answer that question better after seeing the dates of the deeds.

Q. 43. I here hand you an account between yourself on the one side and Skiles & Western on the other, which I have made out from the deeds and contracts, etc., and hand it to you and ask you to go over it item by item, with the deeds, contracts, etc., before you, and correct it wherever it needs correction and attach it as an exhibit to your deposition.

A. I have examined this account, together with the deeds and contracts and receipts, and I am enabled to state that the account is, to the best of my knowledge, correct, excepting as to those marked in red ink, consisting of four items, of which I have no recollection and nothing to refresh my memory.

Q. 44. Have I not handed you copies of the specific performance decrees, properly certified, which show that the circuit court of Jackson county, in suits against the Western heirs to specifically perform the contracts made by you for selling lots 27 & 28, block 10; lot 4, block 5; lot 17, block 4, and lots 29 & 30, block 10, found and adjudged that those items marked with red ink were paid to you in full by the several parties? Does not this refresh your memory at all?

51 A. I have seen the certified copies of the decrees and they refresh my memory so far as the transaction is concerned with the parties, but they do not refresh my memory as to how much money they may have paid me.

Account above referred to marked Exhibit "R" and hereto attached.

Q. 45. Please state whether you have also gone over the credit account of Exhibit "R," and state whether or not there are any other items against Skiles & Wester*b* jointly that should go on that side and if those already there are correct.

A. The items, I think, are correct so far as they go, but there are one or two items that I call to mind that are not mentioned there.

The $12 referred to was to one O'Flaherty for making plats. There was an item to the other O'Flaherty, who surveyed the addition and probably O. K.'d this plat, to whom I paid a bill of, I think, $32, although my memory is somewhat indistinct as to the amount; but I certainly paid a bill for the surveying which is not mentioned in that account. I don't think of any other item now.

Q. 46. When you gave your deposition in the case of Western and others against Skiles, No. 1362 in this court, you filed several due bills and receipts to yourself signed W. W. Western. I hand you the originals and also copies of them to be filed in this case, and ask you to compare the copies with the originals and see if they are correct.

A. I have compared the copies with the originals and they are correct. These eleven documents just referred to are copies on one page in typewriting, and I offer them as an exhibit to my deposition.

(Paper referred to filed, marked Exhibit "S," and hereto attached.

52 Redirect examination by Mr. Hatch:

Q. 47. Do the due bills and receipts referred to in your last answer cover all the money advanced by you to Mr. Western and Mrs. Western?

A. They do not. I think the due bills exhibited and the charges made upon the leaf of my book were for money advanced during a period of time while Mr. Western was here on a protracted spree, during which time his wife came here to try and sober him up and take him home, and I was constantly advancing small sums of money and paying accounts for him. Some of these accounts were paid to hack drivers and afterwards receipted to me by him in the form as here exhibited, and my intention when making the account put in here and taking the receipts was to exhibit them all to Mr. Western when he should sober up, and take a formal receipt for the whole amount. I had paid him, previous to taking any of these receipts, $500 in one sum, and perhaps other sums, and soon after he went home I sent him a sum of money, or his wife—I am not certain which I sent it to—and later on I sent another sum of money, in all, as I now recollect it, amounting to nearly or quite three thousand dollars. This was in part advanced before any sales were made—money which I was to be repaid out of sales—and the balance was advanced when the sales were made, so that he constantly kept in my debt.

Q. How were you to be reimbursed for this money that you advanced to Mr. Western?

A. Out of the proceeds of sales of the property which I was authorized to make. The first advance was made on the day that the power of attorney was given to me, and it was paid into the First National bank, I think, to pay some indebtedness that he owed to the bank, amounting to $500 or over.

53 Q. 49. What were you to receive as services as agent for Mr. Western; in what way were you to be compensated, if you recollect?

A. By commission upon the sales made.

Q. 50. Do you recollect what amount of commission was received?

A. Well, it was the usual commission, but I am not sufficiently clear upon that to state it; it was a good fair commission, I know.

Q. 51. What year did you leave Kansas City?

A. I left in December, 1872.

Q. —. Do you know whether or not letters of administration had been issued to any person upon Mr. Western's estate at that time?

A. None had been issued that I knew of. I feel quite positive that none had been issued, as I was in communication with Mr. Skiles during that time.

Q. 53. Do you know where Mr. Skiles is at this present time?

A. I am informed by his friends from Bowling Green, Kentucky, that — is insane and in an insane asylum in Kentucky.

Recross-examination.

By Mr. Matthews:

Q. 54. Did your brother who was your partner continue to reside in Kansas City from the time that you left, in December, 1872, to the present date?

A. He left here a few months before I did.

Q. 55. Did you have another brother who has resided in Kansas City from the time that you left until the present time?

A. I did.

Q. After Milton Moore, the public administrator, was appointed administrator of the estate of W. W. Western, did you ever, through your brother, by correspondence or in any way whatever, present your claim to said administrator or have a settlement of your accounts with him as against Western's estate?

54 A. I don't know that it ever came to my knowledge that Milton Moore was ever appointed administrator. I never presented any account, as I was indebted to Mr. Skiles for a sum larger than the amount that the Western estate owed me, and I insisted that he take that as a settlement of his account against me. This money due Mr. Skiles he had permitted me to withhold during Western's life as an offset against the indebtedness of Western to me, but would never agree to transfer my indebtedness to Skiles & Western's account or making Western his debtor; but I failed in business here in 1872, and Skiles then consented to this transfer of indebtedness.

Q. 57. I hand you your deposition given in the case of Western and others against Skiles, No. 1362 in this court, given Nov. 26th, 1888, where this question is asked of you: "Of the amount paid by the purchasers of these lots sold by you, what proportion of the amount paid over by yourself did Skiles get and what did Western get?"

A. 11. "Well, from memoranda and receipts that I have and from personal recollection I find that I had paid Western from $1,500 to $2,000, a considerable portion advanced previous to sales of lots, and from receipts and memorandums which I have I find I have paid Mr. Skiles something over four hundred dolla*ts*. I mean a few dollars over four hundred dollars."

—. Also in this deposition now being taken you first said that you had advanced Western about $500 at one time and nearly a thousand dollars more at other times in small sums, and now I understand you to say in reply to a question by Mr. Hatch that, all told, you had advanced Western about $3,000 Please explain this after seeing whether or not I have quoted correctly from your former deposition.

A. The quotation is correct; but since that date my memory has been greatly refreshed by reading the correspondence with
55 Mr. Skiles and Western, which is made exhibits in this case
in my testimony, and by examination of the copies of the deeds and of the amount of money received by me and the dates when received, so that I am now able to testify a great deal more positively as to the actual facts in this case, and I now recollect several sums of money paid to each of said parties which I then did not recollect. In this testimony where I referred to the advancing of the $500 and about the thousand dollars I meant the money advanced precious to the sale of any lots; after that the money paid to him was money which I received on sales.

Q. 58. Do I now understand you to say that the $1,000, as well as the $500, was advanced before any sales of lots were made?

A. No. I find from the date of some sales that I had probably received some money on sales before the full amount of $1,500 was advanced to him, as shown by the account and the date of receipts.

Q. 59. You speak of your memory being refreshed by reading the correspondence, the deeds, &c. Will you please state any specific sum of money that you are enabled, by means of those documents, to remember which you paid to Western or his wife not already included in your book account as heretofore copied in this deposition? If so, please state it, together with the date and circumstances of its payment.

A. From circumstances brought to mind from reading these letters and documents I now recollect a sum of $500 or over which I paid into the First National bank for Mr. Western upon the day that the power of attorney was given to me. I recollect that he wanted it for several days previous to that and he waited very anxiously for the return of that power of attorney from Kentucky, where it had been sent for his wife's signature. The letter of Mr. Western in evidence, marked Exhibit "D," calls to mind all of the facts of a suit having been commenced involving the title to this property, and re-
56 freshes my *my* memory as to the fact that they were indebted
to me then and that I wished to stop all sales and desired them to pay up all indebtedness, and that I was at that time trying to have Mr. Skiles assume a portion of the indebtedness of Mr. Western.

Q. 60. Does your memory, as now refreshed, enable you to recall any other specific sum of money paid by you to Western or his wife? If so, please state it, together with the time and circumstances.

A. I am not enabled to state any other specific sum of money, but the correspondence does refresh my memory so that I recollect of sending Mr. Western sums of money two or three times after he left here, and it also refreshes my memory so that I recollect that at the time of his death he was indebted to me quite a sum of money—several hundred dollars over and above the proceeds of all sales made.

Q. 61. Please give your best estimate, after having thought the matter over, of how much those several hundred dollars amounted to.

A. Well, I should say not less than $300 and probably not over $500.

JOEL F. KINNEY.

Subscribed and sworn to before me this 26th day of April, A. D. 1889.

[SEAL.]

JOHN M. PARRY,
Notary Public, Jackson County, Mo.

57 CHARLES W. EVANS, being duly sworn on the part of the complainants, testified as follows:

Direct examination by Mr. HATCH:

Q. State your name, agre, residence, and occupation.

A. My name is Charles W. Evans; my age, 38 years old next September; residence, Kansas City, Mo.; occupation, contractor.

Q. Where did you reside during the year 1870?

A. Kansas City, Mo.

Q. Are you acquainted with James G. Thayer?

A. Yes, sir.

Q. How long have you known him?

A. I think about 20 or 21 years.

Q. Do you know of the fact of his purchasing lot 13, block 2, Skiles & Western's addition to Kansas City, Mo.?

A. I know of his purchasing a lot in Skiles & Western's addition, but I couldn't tell you the number of the lot and block. I had charge of it for ten or twelve years.

Q. Do you know what street the lot is on?

A. Yes, sir; it is on Wyoming streets. The number of the building is 1624 Wyoming street.

Q. Do you know of his purchasing any other lot in Skiles & Western's addition?

A. No, sir.

Q. State, if you can, when Mr. Thayer purchased this lot in Skiles & Western's addition.

A. He purchased it in 1870; it was June 13th, 1870.

Q. Do you know when he went into possession of that lot?

A. I don't know just exactly the date he went into possession. He bought his lumber and went to building immediately after he got his contract for the lot.

58 Cross-examination by Mr. MATTHEWS:

Q. What did the property rent for per month during the ten or twelve years that you had charge of it?

A. From $10 to $12 per month; — of the time it may have rented for only $8; I am not sure about that.

Q. What would be a fair average monthly rent of it during the time you had charge of it?

A. I couldn't tell what would be a fair rental, on an average, for the whole ten or twelve years. Part of the time it was vacant. Probably ten dollars a month would be a fair rent, as near as I could tell.

Q. You acted as agent for Mr. Thayer during these ten or twelve years?

A. Yes, sir.

Q. May you not be mistaken after the lapse of time from June 13th, 1870, to this date—nearly nineteen years—as to the time when Mr. Thayer went into possession?

A. I suppose I could be mistaken, but I am not mistaken. The reason is that we were boys together—came from the same country, and were neighbors. I was very intomate with his family; was courting his sister and married her.

Redirect examination by Mr. HATCH:

Q. What part of the time during which you acted as agent for this property was the house vacant?

A. I think it was vacant in 1873 part of the time, and probably in 1872—the time of the panic here; I mean part of 1872. The house has never been vacant a whole year at one time.

Q. Can you approximate the time that it has been occupied during the time you were acting as agent?

A. I could only guess at it. I think it was rented about ten months in the year while I had it.

59 Q. Did you perform any work on this buildinf at the time it was built?

A. Yes, sir.

CHAS. W. EVANS.

Subscribed and sworn to before me this 29th day of April, A. D. 1889.

JOHN M. PARRY,
Notary Public, Jackson Co., Mo.

UNITED STATES OF AMERICA, } *sct:*
Western District of Missouri, }

I, John M. Parry, a notary public within and for Jackson county, Missouri, duly commissioned, qualified, and acting as such under and by virtue of the several acts of Congress regulating the taking of depositions *de bene esse* in civil causes depending in the district and circuit courts of the United States, do hereby certify that the witnesses whose depositions are above set forth came before me, at my office, in the custom-house at Kansas City, Jackson county, Mo., and were by me sworn and examined, and that their examination was by me reduced to writing and subscribed by said witnesses in my presence on the day and between the hours and in the behalf aforesaid. I do further certify that I am not of counsel nor attorney for either of the parties to the suit in controversy or in any way interested in the event of said suit. My commission will expire September 24th, A. D. 1889.

In testimony whereof I have hereto set my hand and affixed my notarial seal. Done at office, in Kansas City, in Jackson county, Mo., this 1st day of May, 1889.

[SEAL.] JOHN M. PARRY,
Notary Public, Jackson Co., Mo.

60 EXHIBIT A.

Order of Publication.

In the Circuit Court of Jackson County, Missouri.

THE KANSAS CITY & TOPEKA RAILWAY COMPANY, Petitioner,
against
JAMES G. THAYER, LUCY MERIWETHER, and H. M. Meriwether, Her Husband, and Elgin U. Western, Juliette Long, and —— Long, Her Husband, and T. R. Smith, Defendants.
} No. 11613.

Now, at this day, comes the plaintiff in the above-entitled cause before the circuit court of Jackson county, Missouri, and files its petition, alleging, among other things, that the above-named defendants, James G. Thayer, Juliette Long, and —— Long, her husband, do not reside in this State.

It is thereupon considered by the court that publication be made notifying said non-resident defendants that an action has been commenced against them by petitioner, for condemnation of the property hereinafter described, in the circuit court of Jackson county, Missouri, at Kansas City; that the general object, nature, and substance of the petition is that said petitioner desires to extend its line of railway into the State of Missouri, to appropriate and use as a part of its right of way and for depot purposes the lands and lots hereinafter mentioned, and that said railway company will apply to said court, in the city of Kansas, on Wednesday, the 25th day of January, 1888, for the appointment of, and said court will then hear said petition and appoint, three disinterested freeholders of said county of Jackson as commissioners to assess the damages which the above-named defendants may sustain in consequence of the location, construction, establishment, erection, and maintenance of the

railroad and depot of the Kansas City & Topeka Railway Company upon and over the following-described lots, tracts, or parcels of real estate in the city of Kansas, in said county of Jackson—that
61 is to say, the west 8 feet of lot numbered 13, in block number 2, in Skiles & Western's addition to Kansas City, said county and State, and for the use of the alley between Genessee and Wyoming streets, upon which said premises abut, as prayed for and set forth fully in the petition filed in this cause. It is further ordered that a copy of this notice be published in the Kansas City Journal, a newspaper published in the city of Kansas, in said county of Jackson, for three weeks consecutively prior to said 25th day of January, 1888, when said petition will be heard.

A true copy.

Witness L. F. McCoy, the clerk of said circuit court, with the seal thereof hereto affixed, at office, in Kansas City, this 31st day of December, 1887.

[SEAL.] L. F. McCOY, *Clerk.*

CRITTENDEN, McDOUGAL & STILES,
Attorneys for Petitioners.

EXHIBIT D.

Warner Underwood, attorney-at-law.

BOWLING GREEN, KY., *March 15th*, 1870.

Mr. Joel F. Kinney.

DEAR SIR: I have sent Mr. C. J. Bower, an attorney, whose office is over Mastin's bank, an abstract of our title to the land for which you are our agent. I wish you to confer with Mr. Bower and get him to show you our title. I have written him to show it to you. You will find from that abstract that our title is all of record & is perfect. The suit of Swope is based on a deed from Mary Moore, now the wife of F. M. Moore, who was formerly the wife of Ira Boatman. She is the daughter of Mrs. Boatman (formerly widow of Edmund Petel, dec'd), and while she was the wife of her former husband, Ira Boatman (now deceased), she
62 made and executed to her mother, Elizabeth Boatman, a deed conveying all her interest, both in possession and in expectancy, and her mother deeded to Western and Skiles. Lewis, the other son, deeded to Segar or those from whom Segar purchased. His part has been laid off to him, and there are now no heirs to set up any claim. Paul and Catherine are both dead, and died in infancy, without issue, and if the mother, Elizabeth Boatman, and Lewis and Mrs. Moore would be the heirs of Paul and Catherine they cannot take as heirs, because they, the mother, Lewis, and Mary Moore, have deed- away all their interest with covenants of general warranty, and thus our title is perfect. It has been through court once—see Record Book of court of common pleas, Nov. 28th, 1865, and you will find that the court has settled that the title of Western and Skiles is perfect. I have sent Mr. Bower a statement

of our title, which I wish you to see and satisfy yourself that our title is good. I also wish you to distinctly understand that we hold ourselves indebted to you for any advances you have made or any sum we may owe you; that you shall be fully paid and satisfied, & hope that you will still continue to be our agent, and assure you that the title of our — is perfect. Swope will be compelled to dismiss his suit, because he claims through Mrs. Mary Moore, who has already disposed of her interest. See Deed Book 31, page 15. See the letter to C. J. Bower, and it will explain the whole thing to you. Let me hear from you on receipt of this.

Very respectfully, W. W. WESTERN.

Skiles is in the legislature; will be here on 25 inst.

63 Exhibit E.

Warner Underwood, attorney-at-law.

Bowling Green, Ky., *Aug. 6th,* 1870.

J. F. Kinney, Esq.

Dear Sir: Your letter enclosed to Mrs. W. W. Western, but addressed within to Mrs. H. H. Skiles, was handed me by Mrs. Western last evening for attention.

Mrs. Western is obliged to you for the interest shown in the matter, but she has been advised by Col. Bower, of Kansas City, and others that there is no necessity of having an administrator appointed in your State.

Col. Bower is her agent & att'y, and has full charge of all her interests in and about Kansas City, and he has been written to to prevent the qualification of any one as administrator.

Very respectfully, WARNER UNDERWOOD,
Adm'r of W. W. Western, Dec'd.

Exhibit F.

Circuit Court, Bowling Green, Ky., *Aug.* 3, '70.

Dear Kinney: You will please go to some reliable attorney and learn from him how long it is necessary for one to hold, occupy, control, and cultivate a tract of land before they can plead the statute of limitation in bar of a suit to recover the land in Mo. I have held and possessed the Boatman land since the 18th day of May, 1858. I obtained a bond then for title, and had the deed made on the 5th day of March, 1859, and have held it in cultivation ever since. You can give the lawyer any other fact he will wish to know. I will come out this month and remain all fall. I will see Mrs. Western before I start and tell her that Western was indebted to you and that you had better administer. How much does
64 he owe you? What — 160-acre land warrant worth? You
did not answer this before. You will greatly oblige me by answering as to the limitation referred to immediately. I know the law in this State, but I do not know how long a person must hold

land in Mo. to avail himself of the statutes. Answer by return of mail and give me the news.

Heartily yours, &c., H. H. SKILES.

P. S.—I desire to act on this information this court here now.

H. H. S.

Exhibit G.

Warner Underwood, attorney-at-law.

Bowling Green, Ky., *Oct.* 23, 1869.

Joel F. Kinney.

Dear Sir: Your last letter was received a few days ago. Skiles is out in the country and I have been expecting him, when I would show him your letter and ascertain the reason why he has not sent you, or rather returned you, the deeds you allude to. I suspect, however, it must be on account of some informality in the deeds. As to the claim of the party you allude to, it amounts to nothing, because the case has once been adjudicated in court and all parties warned to appear; beside, all parties are barred by the statute of limitations, we having had possession some 12 or 13 years; beside, the court has decreed us the land upon the title papers exhibited by us, and it is impossible to go behind the record, even if the party had the show of a claim. There is always just such men setting up a claim and establishing it. It will, however, interfere with the sale of
65 lots until the thing is explained. Go on selling and give
warranty deeds, because I am confident of the title; it has gone through court and was thoroughly tested and the- decreed to in joint tenancy. I have in my possession a copy of the decree which I got while in Kansas City. If you have any more deeds you might as well send them on at once and I will see that they are returned at once.

Your friend, W. W. WESTERN.

Let me hear from you.

Exhibit H.

Bowling Green, Ky., *Aug.* 11, 1869.

J. F. Kinney, Esq.

Sir: In a conversation with V. Costhwait on yesterday he informed me that he would take less than $–.00 pr. acre, from which I inferred that he would take about $5. The land, he says, is within 8 miles of Kansas City, & there is 640 acres of it or 460. He is greatly displeased in regard to the amount of taxes he is to pay on it, which is forcing him to sell. Should you go to Independence get my deed from Prentice and send it to me. Please some day, when at leisure, ride by my lot and have some understanding with the Irishman who lives in the house that was built on a portion of my lot. No news. My circuit court is in session and I am very busy. Burnam now owns a tract of land in your county; fixes his price at 10 or 12 $ pr. acre. I think there is no money in that. Go & see

Crosthwait's land and let me know what we can safely afford to pay for it.

Very truly yours, &c., H. H. SKILES.

P. S.—Crosthwait's land is 440 acres, & he has offered it, I think, to W. Z. Hickman, of Independence, for $2,000. Perhaps you had best see him and work through him, as C. has authorized him to sell.

66 SKILES.

Yours with check is at hand.

Exhibit I.

Bowling Green, Ky., *Oct.* 27, '69.

Dear Kinney: The neglect of my Kansas City matters is caused by my absence from home & the conduct of Western since my return. I send you the deed which has been here for some time. I hope it is not too late to prejudice the sale. If the report that there is an heir to that land grows serious, please let me know, & direct your letter to me individually, as if W. gets it & is drunk I will know nothing of it. I will come out if it is necessary.

Note.—Rest of letter illegible.

Exhibit "J."

Bowling Green, Ky., *Sept.* 27, 1869.

Joel F. Kinney.

Dear Sir: You remember the day I left I mentioned to you that Mr. Riggins, a young man at the People's bank, wished to purchase five lots, for which I asked him $275 each. He offered me one thousand *d*or four lots and I told him to take it. I also left with him the "linen trace map" I carried with me. I wish you to get that map from him & send it to us, "Skiles & Western," to this place, so that in case you sell or propose to sell certain lots in certain blocks we can have a map to refer to. It may be that you forgot it on acount of press of business; please let me refresh you on that subject, and let us know how things are coming on; at all events, post us regularly.

67 Very respectfully, SKILES & WESTERN.

If the new city map has arrived send us a copy at our cost.

S. & W.

Exhibit K.

Bowling Green, Ky., *Jan.* 19, 1870.

Joel F. Kinney, Esqr.

Dear Sir: You think it strange I have not written before now. I have a good reason. My difficulties seem to increase upon me, A brother-in-law of Western's and former law partner of Western's, to wit, B. C. Grider, has instituted suit against me for ⅓ of my land in the bottom. Am I not unfortunate? I must do nothing more until I get out, which I think I will in time, but they will do their best to bother me. The poor drunken dunce, Western, is, for my kindness to him, I suppose, against me. Do you know Grider? Please write to me if you have ever heard Western say that Grider was a thord partner of he and myself in that land. Have you ever heard him say any one was? Has he not always represented and stated that he and I were the sole owners, as the deed shows? Grider is trying to prove by Western that he (Grider) is a third partner in the land. We have seen him drunk enough to prove almost anything, but I don't think Grider can make him come it.

Enquire around in a prudent manner of those persons with whom Western associated and learn if he ever said that Grider had an interest amounting to ⅓, or learn if he did not always say that it was mine and his land. Give this some attention and write to me fully.

Respectfully yours, H. H. SKILES.

68 EXHIBIT L.

COMMONWEALTH OF KENTUCKY,
REPRESENTATIVES HALL, FRANKFORT, *Feb.* 11, 1870.

J. F. Kinney, Esqr.

DEAR KINNEY: My intentions have been to write to you for months, yet I have not done so. Business has lately overwhelmed me. How are you getting along? I learn that Thos. H. Swope has instituted suit against Western & I for a portion of the bottom land. Please advise me as to this. The Kt. legislature will adjourn about the 10th of March; then I can devote some time to business there. I will come out in April. Write to me what is going on. I desire to make an arrangement with J. E. Joy to get some land about where the Galveston R. R. will pass the Arkansas & Red river. I have a proposition of that kind now pending, and I want you with me if I succeed in it. Say nothing of this and we will arrange it this spring.

Heartily yours, &c., H. H. SKILES.

Look if there any back taxes due on my land in city taxes.

EXHIBIT M.

BOWLING GREEN, KY., *April* 16, 1870.

J. F. Kinney, Esqr.

DEAR SIR: I have been quite unwell since I left Frankfort, but have recovered, nearly, now. I could have cursed you when I received your note to know that you were so near and I could not get to see you. You could have stopped off and missed but a few hours. I would have given a great deal to have seen you 69 even a few minutes. With regard to Swope and his efforts to annoy me about the land in the bottom, I can say that I believe the title of Western & myself is perfect, & Swope will find it so when he investigates the matter as thoroughly as I have. I am of opinion that we had better do nothing at present, as these reports will prejudice the sale of the lots, perhaps, and it will soon appear that they are all false, and by that time everything will be more prosperous and the value of the lots will be enhanced by general improvement in that locality. I wish, however, in the meantime you would advise me how matters are progressing and tell me what you hear these fellows are doing. My father has turned over to me his entire farm, and when I get it stocked and in shape, which will detain me several weeks, I will come to Kansas and remain all summer and fall, until I get everything quieted. Tell me if the property around us is increasing and give me the news generally. How will it do to go in with Joy and buy land out on Red or Arkansas rivers ahead of his road? Answer when you can.

Yours truly, &c., H. H. SKILES.

Exhibit N.

Bowling Green, Ky., *July* 8, 1870.

J. F. Kinney, Esqr.

Dear Sir: I have purchased a land warrant for 160 acres of land. I took it in a trade and I know but little of its value, having never deal*th* much in them. Please let me know what it is worth and where I can use it to the best advantage. I desire to locate it so soon as possible, but do not know the best locality. Can you 70 give me any information on the subject? Answer by return mail if you can. If you do not know, ask some one that does.

I have just left Western, poor fellow. I think he is dying. I think he will not live more than 24 hours. He has been drinking hard for several months; he has drawn too heavily upon himself this time. It would have been greatly to my advantage for him to have lived. I regret deeply. He has been true to me when he was at himself, but whiskey and the influence of bad company has hastened him to his grave & warped a good nature. I fear it may involve me in additional difficulty, but I prepare for the worst and hope for the best. I will be out there so soon as my present circuit court is over. If you know anything in regard to my interest there please advise me, and oblige,

Y'rs truly, &c., H. H. SKILES.

Exhibit "O."

Bowling Green, Ky., *July* 14, '70.

Dear Kinney: Western is dead. Y'r last letter was rec'd yesterday. I am willing, so far as my interest is concerned, to com-promise with Petell if it is clear that he is entitled to his part of the Boatman land, and you can so tell his att'y. I will come out soon, but not until August. I will, if I can, get power of attorney from Mrs. Western, so that I can effect something in way of a final settlement with Petell. Have you seen Grider lately? Is he drunk or sober?

Hastily, H. H. SKILES.

71 EXHIBIT "P."

BOWLING GREEN, KY., *Sept.* 17, 1870.

J. F. Kinney, Esqr.

DEAR SIR: I have just gotten through with one of my important courts and suits and am ready to come out there, but would like to remain here until the 29 of this month. Is it important that I should be there before that time? If so, I will come immediately. Let me know at once.

Hastily yours, H. H. SKILES.

What can you sell a Revolutionary soldier's land warrant for 160 acres for?

S.

EXHIBIT Q.

J. F. Kinney, Esqr.:

I saw this morning a William Newcomb, who lives south of the Union depot, in the bottom H. & St. J. shop. He desires to buy a lot near Lauter. I told him the lots were not in the market. He desires to lease as you state. You can lease him some of the lots, but have it in writing that holds at will, and when the suits are decided he may have the preference in the sale of the lots he has improved, but I could not fix any price now to contract then. You can, if it be convenient, see him and lease the lots as above stated. It can work no harm or injury in any way and will be bringing in something.

Yours, &c., H. H. SKILES.

Jan. 27, 1871.

The officers at the telegraph office at the Union depot can tell where Newcomb lives.

EXHIBIT "R."—*Joel F. Kinney in Ac. with Skiles & Western.*

1869.		
June 1.	Jno. S. Healde, deed, lot 1, B. 11	$225 00
July 28.	Jno. Lynch, " lots 15 & 16, B. 10	400 00
Aug. 3.	Thos. Farrell, " " 5 & 6, " "	500 00
Sept. 1.	Henry Brawn, " lot 2, " "	250 00
" "	S. A. Devens, " " 6, " 9	225 00
Sept. 1.	Duncan M. Vance, deed, lot 3, " 7	250 00
" "	J. W. Sweeny, " " 7, " 9	225 00
		2,075 00
" 14.	J. E. Neal, contract, lot 10, B. 9	60 00
Oct. 16.	E. H. Minton, " lots 29 & 30, B. 10	250 00
	Spec. per. decree.	
" 19.	John T. Balch, lots 27 & 28, B. 10	475 00
" 27.	H. F. McDaniel, for J. R. Bradley, lots 17, 18, & 19, B. 10	250 00
	Receipts held by T. J. Disbrow, lot 17, B. 10	350 00
1870.		
Feb. 12.	S. H. Coulson, contract, lot 11, B. 9	25 00
Mar. 14.	J. E. Neal, receipt on back, " 10, " "	68 25
" 18.	H. J. Fisher, contract, " 4, " 5	25 00
	Spec. perform. decree	225 00
April 8.	Frederick Ledgerd, contract, lot 3, B. 5	75 00
May 10.	James Boone, " " 3, " 10	36 00
" 24.	Margaret Wandell, " " 28, " 4	10 00
" 26.	Henry McMain, " " 17, " 4	15 00
June 13.	James G. Thayer, " " 13, " 2	50 00
" 27.	Henry McMain, receipts, " 17, " 4	15 10
July 25.	" " " " " " "	15 25
Aug. 13.	S. H. Coulson, " " 11, " 9; int. p'd	120 75
Aug. 23.	Henry McMain, receipt (rec'pts?) lot 17, B. 4	15 35
	Spec. perf. decree, " " " "	90 00
Sept. 12.	E. H. Minton, " " " lots 29 & 30, B. 10	275 00
" 13.	James G. Thayer, receipt, lot 13, B. 2	102 50
1871.		
May 11.	James Boone, receipt at foot, lot 3, B. 10	200 00
" 15.	" " " " " " " " "	30 00
Aug. —.	James G. Thayer, " on back, " 13, " 2	165 00

1869.		
	O'Flaherty, surveying & platting S. & W. add.	12 00
July —.	Recorder, for recording plat " "	19 20
	Stamps, U. S. inter. rev., on contracts	10 00
	" " " " " "	9
	Abstract of title	7 50

73 EXHIBIT S.

K. C., *June 27th*, '69.

Due J. F. Kinney thirty ($30.00) dollars on demand.

W. W. WESTERN.

$70.00. JULY 7TH, 1869.

Due on demand $70.00 to J. F. Kinney for value received of him.

W. W. WESTERN.

K. C., *July* 14, '69.

Due J. F. Kinney twenty-five dollars, value received.

W. W. WESTERN.

JULY 22ND, 1869.

Due J. F. Kinney one hundred dollars for value received.

W. W. WESTERN.

K. C., *Aug.* 1*st*, '69.

Due J. F. Kinney twenty-five ($25.00) dollars, value rec'd.

W. W. WESTERN.

K. C., *Aug.* 4, '69.

Rec'd of J. F. Kinney one hundred dollars; money rec'd for property sold in S. & K.'s add.

W. W. WESTERN.

KANSAS CITY, MO., *Aug.* 6*th*, 1869.

Rec'd of J. F. Kinney one hundred ($100.00) dollars; money rec'd for property sold in Skiles and Weston's add.

W. W. WESTERN.

K. C., *Aug* 8, '69.

Rec'd of J. F. Kinney one hundred ($100.00) dollars; money due on property sold.

W. W. WESTERN.

K. C., *Aug.* 18*th*, '69.

Rec'd of J. F. Kinney fifty ($50.00) dollars on account of lots sold.

W. W. WESTERN.

KANSAS CITY, MO., *Aug.* 26*th*, 1869.

Mr. Joel Kinney:

Please let Mr. Brown have ten dollars and charge to my account.

W. W. WESTERN.

Mr. J. F. Kinney:

Please pay Mrs. Aldridge forty-five dollars and charge to my account.

Aug. 30, 1869.

W. W. WESTERN.

74 EXHIBIT T.

W. W. Weston & Wife
to
J. F. Kinney.
} Power of Attorney.

Know all men by these presents that we, W. W. Weston & Juliet W. Weston, wife of said W. W. Weston, have this day made, constituted, and appointed, & do by these presents make, constitute, and appoint J. T. Kinney, of Kansas City, Missouri, our true and lawful attorney-in-fact, for us and in our names to sell and dispose of absolutely in fee simple the following-described tract of land or any portion thereof in Jackson county, Missouri:

All the interest we have in and to the south half of the west half of the southwest quarter of sec. six, township 49, range 33, for such price or sum of money and to such person or persons as he shall think fit and proper; also for us, in our names and as our act and deed, to sign, execute, acknowledge, and deliver such deed or deeds and conveyance or conveyances for the absolute sale and disposal thereof or any part thereof, with such clause or clauses, covenant or covenants, agreement or agreements, to be therein contained as my said attorney shall think fit and convenient, hereby ratifying and confirming all such deeds, conveyances, bargains, and sales which shall at any time hereafter be made by our said attornet touching or concerning the premises.

In testimony of which we have hereunto set our hands and affixed our seals this 21st day of June, 1869.

W. W. WESTON. [SEAL.]
JULIETTE U. WESTON. [SEAL.]

50c. rev. stamp.

STATE OF KENTUCKY,
County of Warren,
} *ss:*

75 Be it remembered that on this the 21st day of June, 1869, before me, the undersigned, notary public within and for the county aforesaid & State, came W. W. Weston and Juliette U. Weston, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and they acknowledged the same to be their act and deed for the purposes therein mentioned; and the said Juliette U. Weston, being by me made acquainted with the contents of said instrument and power of attorney, acknowledged, on an examination separate and apart from her said husband, that she executed the same freely and without compulsion or undue influence of her said husband, and relinquishes her dower in and to said real estate.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this the day and date above written.

[SEAL.] WARNER UNDERWOOD,
Notary Public.

The foregoing power of attorney and acknowledgment from W. W. Weston & wife to J. F. Kinney was deposited and duly recorded in my office this 12th day of July, 1869.

A. COMINGO, *Recorder*,
By L. McDONALD, *Dep.*

STATE OF MISSOURI,
County of Jackson, } *ss:*

I, R. T. Hinde, recorder of deeds within and for the county of Jackson aforesaid, do hereby certify that the foregoing is a full, true, and complete transcript of the record of the power of attorney, acknowledgment, and note of record thereon endorsed from W. W. Weston & wife to J. F. Kinney, as the same now remains of record in my said office in Book 70, at page 86 and following.

76 In testimony whereof I hereunto set my hand and affix the seal of my said office this the 20th day of April, A. D. 1889.

[SEAL.]

R. T. HINDE, *Recorder*,
By JOHN W. HINDE, *Deputy*.

EXHIBIT U.

KANSAS CITY, MO., *May 2nd*, 1870.

Received of Thomas J. Disbrow the sum of two hundred and fifty ($250.00) dollars as part payment for lots seventeen (17), eighteen (18), and nineteen (19), in block No. (10) ten, in Skiles and Western's addition to the City of Kansas, Jackson county, Mo., leaving a balance of four hundred and seventy-five ($475.00) dollars, due Jan'y 15th, 1871, with ten per cent. interest from date, said Thomas J. Disbrow agreeing to pay city, county, and State taxes for year 1870, and Skiles and Western to pay all back of said date. On the payment of said $475.00, with interest as aforesaid, H. H. Skiles and W. W. Western agree to make to said Thomas J. Disbrow a good and sufficient deed to said above-described property.

(Signed) J. F. KINNEY,
Agent for H. H. Skiles and W. W. Western,
of Warren Co., Ky.

KANSAS CITY, MO., *May 1st*, 1889.

The above is a true copy of an original document this day shown me, which is signed in my handwriting.

J. F. KINNEY.

77 K. C., Mo., *Dec. 6th*, 1870.

Thos. J. Disbrow, Alden, Ill.

DEAR SIR: Your favor of the 1st inst. at hand and contents notes. In reply will say we think your proposition will be satisfactory, but we can speak only as agents and one of our principals cannot now speak, her husband having recently died and the will not being yet probated. Send on the $300 and if it should not be satisfactory we will notify you in due time.

Very respectfully, &c., KINNEY & KINNEY.

KANSAS CITY, MO., *January 30th, '70.*

Rec'd from T. J. Disbrow three hundred ($300.00) dollars to apply in part payment for lots 17, 18, & 19, block ten (10), in Skiles & Western's addition to Kansas City, said lots being same sold S. H. Johnson and by him transferred to said Disbrow.

J. F. KINNEY, *Ag't,*
Per WM. C. K.

CLINTON, MO., *November 22nd,* 1871.

Jno. J. Mastin & Co. pay to Kinney & Kinney, real-estate agents, Kansas City, Mo., the sum of fifty dollars.

$50.00. A. WAKEMAN.

(Endorsed on back:) Kinney & Kinney, S. H. Kinney, H. M. Holden, c'h'r.

78 The within contains true copies of original documents, but the receipt for three hundred dollars should probably be dated Jan'y 30th, 1871, instead of Jan'y 30th, 1870.

JOEL F. KINNEY.

We agree that the within copies may be filed with Joel F. Kinney's deposition, together with his statement just above, which shall have the same force as if stated by him in said deposition in case of Thayer *vs.* Long.

HATCH & MIDDLEBROOK,
Att'y- for Thayer.

79 The pleadings in said case No. 1367, Fred. H. Long *vs.* Townsend R. Smith *et al.*, referred to and made an exhibit to the deposition of James G. Thayer, are as follows:

Petition. (*Filed Oct.* 22, 1887.)

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri, to May Term, 1888.

FRED. H. LONG, Plaintiff,
against
TOWNSEND R. SMITH, Defendant.

The plaintiff states that he is a citizen of the State of California, and that the defendant is a citizen of the State of Missouri; that on the 26th day of September, 1887, the plaintiff was entitled to the possession of the following-described premises, to wit:

Lot numbered thirteen (13), in block numbered two (2), in Skiles & Western's addition to the City of Kansas, Missouri, situated in Jackson county, of said State.

And, being so entitled to the possession thereof, that the defendant afterwards, to wit, on the 27th day of September, 1887, entered into said premises and unlawfully withholds from the plaintiff the possession thereof, to his damage in the sum of one dollar; that the value of said real estate is more than two thousand dollars, $2,000.

He further avers that the monthly value of the rents and profits of the premises is $20.00. Wherefore he demands judgment for the recovery of the premises and $1.00 damages for the unlawful detention thereof and $20.00 per month for monthly rents and profits *de*om the rendition of judgment until the possession of the premises is delivered to plaintiff, and for other proper relief.

MATTHEWS & MERIWETHER,
Attorneys for Plaintiff.

80 *Summons.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

The President of the United States of America to the marshal of the United States for the western district of Missouri, Greeting:

You are hereby commanded to summon Townsend R. Smith, a citizen of the State of Missouri and a resident of the western division of the western district thereof, to be and appear before the honorable circuit court of the United States in and for the western division of the western district of Missouri on the first day of the next term thereof, to be begun and holden at the City of Kansas, in said district, on the third Monday, the 21 day, of May next, then and there to answer the complaint of Fred. H. Long, a citizen of the State of California, as set forth in the petition filed in the office of the clerk of said court on the 22nd day of October, A. D. one thousand eight hundred and eighty-seven.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 22 day of Oct., A. D. eighteen hundred and eighty-seven.

Issued at office, in the City of Kansas, in said district, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] WARREN WATSON, *Clerk,*
By A. UTTER, *Deputy Clerk.*

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *sct:*

I do hereby certify that I served the within writ by delivering a true copy there-, together with a true copy of the petition
81 in said cause, to an adult member of the family of Townsend R. Smith at his usual place of abode.

All done at Kansas City, Mo., on this 27th day of October, 1887, and in the western division, western dist. of Mo.

ELIJAH GATES,
United States Marshal,
By C. C. COLT, *Deputy.*

Answer of Townsend R. Smith. (*Filed May* 1, 1888.)

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri.

FRED. H. LONG, Plaintiff,
vs.
TOWNSEND R. SMITH, Defendant.
No. 1367. In Ejectment.

Answer.

Now comes defendant in the above-entitled cause and for answer to the plaintiff's petition denies each and every allegation in the plaintiff's petition contained, except as herein admitted.

Second. Defendant admits that at the time he was served with a copy of the plaintiff's petition and writ he was in possession of the premises described in said petition.

Third. Defendant, further answering, states that while in possession, at the time aforesaid, he was occupying said premises as the tenant of James G. Thayer.

HATCH & MIDDLEBROOK,
For Defendant Townsend R. Smith.

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82 *Stipulation.* (*Filed May 23rd*, 1888.)

In the United States Circuit Court, Western Division of Western District of Missouri.

FRED. H. LONG
vs.
TOWNSEND R. SMITH.
No. 1367. May Term, 1888.

It is hereby stipulated and agreed by and between the parties hereto as follows:

1. That James G. Thayer may be made party defendant in the above cause, with rights to file answer and defend.
2. That said Thayer may have until noon of May 26th, 1888, in which to file his answer in said action.
3. That the above-entitled cause shall be placed at the foot of the docket of this term and passed until reached in its regular course at that place.

MATTHEWS & MERIWETHER,
Attorneys for Fred. H. Long.
HATCH & MIDDLEBROOK,
Att'ys for Defendant & James G. Thayer.

Answer of James G. Thayer. (Filed May 26, 1888.)

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri, to May Term, 1888.

FRED. H. LONG, Pl'ff, *vs.* TOWNSEND R. SMITH. } No. 1367. In Ejectment.

Answer of James G. Thayer, a codefendant by stipulation and order of court.

Now comes James G. Thayer and for his separate answer to plaintiff's petition filed in the above-entitled cause states:

83 First. That he denies each and every allegation as are specifically admitted to this his answer.

Second. Defendant admits that on the 27th day of September, 1887, the defendant, Townsend R. Smith, was in the possession of lot number (13) thirteen, in block number two (2), in Skiles and Western's addition to the city of Kansas, Missouri, situated in Jackson county, in said State.

Third. By way of affirmative answer and defense defendant avers that on the said 27th day of September, 1887, and for some time prior and subsequent thereto, the defendant, Townsend R. Smith, was in possession of the above-described premises as the tenant of the defendant paying rent by the month to defendant; that on June 13th, A. D. 1870, this — entered into an agreement in writing with H. H. Skiles and W. W. Western, the then owners of said above-described premises, which agreement is in words and figures as follows, to wit:

"KANSAS CITY, MO., *June 13th*, 1870.

Received of James G. Thayer fifty dollars and one promissory note for one hundred and two and $\frac{50}{100}$ dollars, due in three months from date, and another promissory note, due in one year from date, for one hundred and fifty dollars, with ten per cent. interest, all of the above being in full consideration for lot number 13, thirteen, block number two (2), Skiles and Western's addition to Kansas City, it being understood and agreed that in case each of the before-mentioned notes are paid at maturity, then Skiles & Western are to give a good and sufficient deed to said lot thirteen (13), block two (2), Skiles & Western's addition to Kansas City, but a failure to pay either of said notes at maturity shall forfeit this contract.

H. H. SKILES,
W. W. WESTERN,
By J. F. KINNEY, *Agent.*

Attest:
WM. C. KINNEY.
J. W. KINGSCOTT.

84 Which said agreement is hereto attached and filed herewith as a part of this answer.

That defendant has fully complied with his part of the aforesaid written agreement according to the terms and stipulations therein set forth, and has fully paid off and discharged, according to their true date, tenor, and effect, the promissory notes referred to in said written agreement as being notes which defendants agreed so to pay; that a short time before the last of said notes became due or about the time of its coming due, said W. W. Western died, and said H. H. Skiles has always refused and neglected to make and deliver to defendant a warranty or other deed to said premises; that the plaintiff in this cause is the grantee of the heirs-at-law of the said W. W. Western, deceased; that a partition was had between said Skiles and said heirs by which said heirs undertook to take title to the premises in question, thus divesting the title of said Skiles; that said partition was long subsequent to the making of the written agreement hereinbefore set out and hereto attached; that on September 13th, 1870, defendant paid the last note aforesaid and entered into possession of the premises in question, and has ever since then been in open, notorious, continuous, adverse possession thereof under claim of right and color of title.

That on April 12th, 1875, the said written agreement was recorded in the office of the recorder of deeds in and for the county of Jackson, State of Missouri, at the City of Kansas, in Book B # 17, at page 604, and plaintiff acquired his deed from the heirs of the said W. W. Western with full knowledge of the terms and conditions and contents of the said written agreement so recorded as aforesaid; that this defendant has made valuable and costly improvement on said lot, consisting of a frame dwelling-house and appurtenances, 85 of the value of fifteen hundred dollars, and has paid all taxes, general and special, assessed against the same since his aforesaid purchase there*if*—that is to say, since the payment by him of the last of the promissory notes mentioned in said written agreement—and in addition thereto defendant has paid delinquent taxes for the years of 1865 & 1869, 1870, neglected and unpaid by said Skiles & Western. Defendant says that by reason of the premises he has in equity a right to the immediate and continuous possession of the property in question, which he now enjoys and which he herein sets up as a defense to this action; that said defendant is equitably entitled to the land described in the petition; that plaintiff holds whatever title, if any, that he possesses in trust for this defendant.

Wherefore defendant prays judgment in this behalf; that the court order and that defendant is entitled to the possession of the land in controversy; that plaintiff holds the title, if any shown by him, in trust for this defendant; that by proper and equitable decree the court adjudge the title in the premises in question to be in this defendant, and for costs and for such other and further relief as to the court shall seem just and equitable in the premises; and this defendant will ever pray.

HATCH & MIDDLEBROOK,
For Defendant James G. Thayer.

86 (Stamp.) KANSAS CITY, MO., *June* 13*th*, 1870.

Rec'd of Jas. G. Thayer fifty dollars and one promissory note for one hundred & two $\frac{50}{100}$ dollars, due in three months from date, and one other promissory note, due in one year from date, for one hundred & fifty dollars, with ten per cent. interest, all of the above being the full consideration for lot No. (13) thirteen, block No. (2) two, Skiles & Western's addition to Kansas City, it being understood and agreed that in case each of the before-mentioned notes are paid at maturity, then Skiles & Western are to give a good and sufficient deed to said lot 13, B. 2, Skiles & Western's addition to Kansas City, but a failure to pay either of said notes at maturity shall forfeit this contract.

H. H. SKILES,
W. W. WESTERN,
By J. F. KINNEY, *Agent.*

Attest:
WM. C. KINNEY.
J. W. KINGSCOTT.

(Endorsed on the back as follows:) K. C., Aug. 14th, 1871. Rec'd of Jas. Thayer two hundred & sixty-seven $\frac{50}{100}$ dollars, in full of all moneys due on the within contract. J. F. Kinney. Skiles & Western. To bond, 82. Book B 17, page 604. Recorder's fee, $1.00, paid. Filed for record this 12th day of April, A. D. 1875, at 10.45 a. m. Chas. D. Lucas.

87 STATE OF MISSOURI, }
County of Jackson, } *ss:*

IN RECORDER'S OFFICE.

I, Chas. D. Lucas, recorder of deeds within and for the county aforesaid, do hereby certify that the foregoing and annexed instrument of writing was on the 12th day of April, A. D. 1875, at 10 o'clock 45 minutes a. m., duly filed for record in this office and, with the certificate of acknowledgment thereon endorsed, is recorded in the records of this office in Book B # 17, at page 604.

[SEAL.] In witness whereof I hereunto set my hand and affix the seal of said office, at Kansas City, Mo., the day and year last aforesaid.

CHAS. D. LUCAS, *Recorder,*
By F. L. PETRI, *Deputy.*

$150.00. K. C., *June* 13*th*, 1870.

One year after date I promise to pay J. F. Kinney or bearer one hundred and fifty dollars, with ten per cent. interest, for value received.

(Stamp.) JAMES G. THAYER.

(Endorsed across the face:) Paid in.

Rec'd of James G. Thayer one hundred and two & $\frac{50}{100}$ dollars, to apply on note dated June 13, 1870, & due this date, for $102.50.

H. H. SKILES &
W. W. WESTERN,
Per KINNEY.

Kansas City, Mo., Sept. 13, 1870.
(Stamp.)

88 *Stipulation.*

In the Circuit Court of the United States, Western Div. of Western District of Missouri.

FRED. H. LONG
vs.
JAMES G. THAYER and TOWNSEND R. SMITH. } No. 1367.

It is stipulated by and between the plaintiff and the defendants that the following facts may be used in evidence by either of the parties to this suit, but nothing herein contained shall prevent either of said parties from introducing evidence as to any other facts, except such evidence as is contradictory of the facts herein agreed on.

1. That about the year 1850 the widow and heirs of Edward Petelle were the owners in fee simple of all the property now known as Skiles & Western's addition to the City of Kansas, Missouri, being a part of the S. W. $\frac{1}{4}$ of section 6, township 49, range 33, and were in possession of said property.

2. That the said heirs and widow of Edward Petelle sold said property by separate deeds to several parties, and by this means the following parties became the owners of said property in the following proportions, to wit: Henry H. Skiles, $\frac{35}{130}$; William W. Western, $\frac{35}{130}$; Logan O. and Thos. H. Swope, $\frac{38}{130}$, and Frank M. Spencer, $\frac{22}{130}$.

3. That on the 17th day of April, 1873, a partition was had of the aforesaid premises by a suit in the circuit court of Jackson county, Mo., by which the interests of all the above-named parties was set apart to them in the proportions as stated, and lot 13, in block 2, of said addition, the property in litigation in this suit, was set apart to the heirs of William W. Western, the said Western having died previous to said partition.

89 4. That on the 13th day of June, 1870, William W. Western and Henry H. Skiles, through their agent, J. F. Kinney, made a contract of sale with defendant James G. Thayer, by which they agreed on certain conditions to sell to him said lot 13, block 2, Skiles & Western's addition, said contract being the one set out in the defendant Thayer's answer, herein filed and attached thereto.

5. That on the 13th day of September, 1870, defendant Jas. G. Thayer went into possession of said property under and by virtue of the contract above mentioned.

6. That said Jas. G. Thayer is still in the possession of said lot 13, claiming to own the whole of the same under and by virtue of said contract of sale and the statute of limitations.

It is stipulated and agreed by the parties to this suit that a jury shall be waived in the trial of this cause.

HATCH & MIDDLEBROOK,
For Defendants, Townsend R. Smith & James G. Thayer.
MATTHEWS & MERIWETHER,
For Plaintiff, Fred. H. Long.

90 *Amended Answer.*

In the Circuit Court of United States for the Western Division of the Western District of the State of Missouri, May Term, 1888.

FRED. H. LONG
vs.
TOWNSEND R. SMITH. } In Ejectment. No. 1367.

Separate amended answer of James G. Thayer.

Now comes James G. Thayer and for his separate amended answer to plaintiff's petition filed in the above-entitled cause states:

First. That he denies each and every allegation therein contained, except such allegations as are specifically admitted in this his answer.

Second. Defendant admits that the defendant Townsend R. Smith was in the possession of lot number thirteen (13), in block number two (2), in Skiles & Western's addition to the city of Kansas, Jackson county, Missouri.

Third. By way of affirmative answer and defense defendant avers that on said 27th day of September, 1887, and for some time prior and subsequent thereto, the defendant Townsend R. Smith was in possession of the above-described premises as the tenant of this defendant, paying rent by the month for said premises to this defendant; that on the 13th day of June, A. D. 1870, this defendant entered into an agreement in writing with H. H. Skiles and W. W. Western, the then owners of the above-described premises; which agreement is in words and figures as follows, to wit:

"KANSAS CITY, MO., *June 13th*, 1870.

Received of James G. Thayer fifty dollars and one promissory note for one hundred and two and $\frac{50}{100}$ dollars, due in three months from date, and one other promissory note, due in one year from
date, for one hundred and fifty dollars, with ten per cent. in-
91 terest, all of the above being the full consideration for lot
number thirteen (13), block number two (2), Skiles & Western's addition to Kansas City, it being understood and agreed that in case each of the before-mentioned notes are paid at maturity, then Skiles & Western are to give a good and sufficient deed to said lot thirteen (13), block two (2), Skiles and Western's addition to Kansas

City; but a failure to pay either of said notes at maturity shall forfeit this contract.

H. H. SKILES,
W. W. WESTERN,
By J. F. KINNEY, *Agent.*

Attest:
WM. C. KINNEY.
J. W. KINGSCOTT."

Which said agreement is hereto attached and filed herewith as a part of this answer.

That this defendant has fully and in good faith complied with his part of the aforesaid written agreement, according to the terms and stipulations therein set forth, and has fully and in good faith, not knowing of the existence of any claim or right of title in plaintiff or his grantors, paid off and discharged, according to their true date, tenor, and effect, the promissory notes referred to in said written agreement as being notes which defendant agreed so to pay; that about the time the last of said notes became due said W. W. Western died, and the said H. H. Skiles has always refused and neglected to make and deliver to defendant a warranty or other deed to said premises, and still neglects and refuses so to do; that the plaintiff in this case is the grantee of the heirs-at-law of the said W. W. Western, deceased.

That a partition proceeding was had by and between the said Skiles and the said heirs-at-law of the said Western by which said heirs undertook to take title to the premises in question, or so much thereof as had theretofore been owned or claimed by the said Skiles; that said partition suit was brought and tried in the circuit
92 court of Jackson county, Missouri, subsequent to the execution of the contract hereinbefore set out between defendant and said Skiles & Western.

That on the 13th day of July, 1870, defendant, in good faith, not knowing of the existence of any adverse claims to said premises, entered into the possession of the premises in question and has ever since that date been in open, notorious, adverse, continuous possession thereof under claim of right and color of title; that defendant was not in any way made a party to the said partition proceeding; that on the 12th day of April, A. D. 1875, the said written agreement was recorded in the office of the recorder of deeds in and for the county of Jackson, State of Missouri, at the City of Kansas, and plaintiff acquired his deed from the heirs of the said W. W. Western with full knowledge of the terms, conditions, and contents of the said written agreement so recorded as af*p*resaid.

That in good faith, not knowing of the existence of any claims against said premises, defendant has made permanent improvements thereo*f* of the value of one thousand dollars and has paid taxes, State, county, and city, aggregating — dollars.

That said Skiles & Western neglected and refused to pay the city taxes due the City of Kansas aforesaid for the years 1865, 1869, & 1870, by reason whereof the city collector of said city, on the 8th

day of January, A. D. 1876, sold the premises in question to F. H. Benson & Sons for delinquent taxes due the said city on said premises for the years 1865, 1869, and 1870, and said city on said date issued to said Benson a certificate of purchase, as by the charter of the city aforesaid is provided; that, on the 24th day of January, 1876, said Benson & Sons sold and assigned the said certificate of purchase to defendant for value received, and on the 9th day
93 of November, 1877, said city, by proper deed, made, executed, and delivered in accordance with the charter of said city, deeded to defendant the premises in question, which deed was duly recorded in the office of the recorder of deeds for Jackson county, Missouri, on the 9th day of November, 1877, in Book B No. 27, at page 461; that the sale by said city to said Benson as aforesaid was begun and publicly held, as provided by the charter of said city, on the first Monday of November, A. D. 1875, and said sale was adjourned from time to time, as provided by said charter, until the 8th day of January, 1876, the same day on which said Benson purchased said premises.

Defendant says that by reason of the premises he has a right to the immediate and continuous possession of the premises in question; that defendant is equitably entitled to the premises described in the petition; that plaintiff holds whatever title, if any, that he possesses in trust for this defendant.

Wherefore defendant prays judgment in his behalf that the court order and decree that defendant is entitled to the possession of the land in controversy; that plaintiff holds the title, if any, shown by him in trust for this defendant; that by proper and equitable decree the court adjudge the title in the premises in question to be in this defendant, and for costs and for such other and further relief as to the court shall seem just and equitable in the premises; and thus the defendant will ever pray.

HATCH & MIDDLEBROOK,
For Defendant, James G. Thayer.

Service of copy of the foregoing answe- accepted by us this 19th day of Oct., 1888.

MATTHEWS & MERIWETHER,
Att'ys for Pl'ff.

94 *Reply.*

In the Circuit Court of the United States for the Western Division of the Western District of the State of Missouri.

FRED. H. LONG
vs.
TOWNSEND R. SMITH
} No. 1367.

Reply.

1. The plaintiff, replying to the third paragraph or counter-claim of defendant Thayer's answer, denies each and every allegation therein contained except as hereinafter expressly admitted.

Plaintiff admits that defendant Smith was in possession of the lot in controversy when this suit was instituted.

It is true that the property in controversy was assigned to plaintiff's grantors in a partition had between said grantors and Henry H. Skiles and others in the year 1873.

It is true that defendant James G. Thayer entered into the contract alleged in his answer with Skiles and Western through their agent, J. F. Kinney, and that defendant Thayer took and held possession of lot 13, block 2 aforesaid, claiming under and by virtue of said contract, but he did not go into possession of said lot until September 13, 1870.

2. And for another and further reply to said counter-claim or third paragraph of defendant Thayer's amended answer, plaintiff says that said W. W. Western departed this life on the 9th day of July, A. D. 1870, intestate as to said land now in controversy, leaving him surviving as his only heirs-at-law his two children, Elgin U. and Lucy U. Western (now the wife of Hunter M. Meriwether), then infants about four and two years of age respectively,
95 and they were the owners of said land in fee until they conveyed the same to plaintiff by deed executed on the 9th day of June, 1887.

MATTHEWS & MERIWETHER,
Attorneys for Plaintiff.

Plaintiff's Abstract of Title.

FRED. H. LONG
vs.
T. R. SMITH *et al.*
No. 1367.

Memoranda of title for plaintiff.

1. Both parties to this suit claim under a common source of title—that is, under one Edward Petelle—as shown by the stipulations on file in this cause.

Plaintiff insists that both parties to this suit claim under a certain partition had in the circuit court of Jackson county, Missouri, on the 17th day of April, A. D. 1873, between the grantees of the heirs of said Edward Petelle.

3. It also appears from said stipulations that lot 13, block 2, of Skiles & Western's addition, the property here in litigation, was set apart in said partition decree to the heirs of William W. Western. A certified copy of said partition decree is on file in the office of the recorder of deeds for Jackson county, Missouri, in Book B 5, page 178.

4. The sole legal heirs of William W. Western are Elgin U. Western and Lucy U. Western, now Lucy U. Meriwether.

5. A warranty deed from Elgin U. Western and Lucy U. Western to Fred. H. Long, dated the 9th day of June, A. D. 1887, acknowledged the 9th day of June, A. D. 1887, by Elgin U. Western, at Kansas City, and the 16th day of June, A. D. 1887, by Lucy U.

Western, in Lakeport, California. Said deed is recorded in Kansas City in Book B 278, page 571.

6. The real matters in controversy are: (*a*) Whether defendant
has been in continuous adverse possession of said real prop-
96 erty for a sufficient time to bar a recovery by plaintiff. (*b*)
Whether a certain tax deed obtained by defendant is suffi-
cient to bar a recovery by plaintiff.

This indenture, made on the 9th day of June A. D. one thousand eight hundred and eighty-seven by and between Elgin U. Western and Lucy U. Western, sole heirs of W. W. Western deceased of the county of Jackson State of Missouri parties of the first part and Fred. H. Long of the county of Jackson State of Missouri party of the second part, witnesseth:

That said parties of the first part in consideration of the sum of four thousand nine hundred ($4,900) dollars, to them paid by the said party of the second part (the receipt of which is hereby acknowledged), do by these presents grant bargain and sell, convey and confirm, unto the said party of the second part his heirs and assigns the following-described lots, tracts or parcels of land, lying being and situate in the county of Jackson and State of Missouri to wit: All lot thirteen (13) of block two (2) in Skiles & Western's addition to Kansas City as the same is marked and designated on the plat of said addition on file with the recorder of deeds for Jackson county at Kansas City Missouri.

To have and to hold the premises aforesaid, with all and singular the rights, privileges, appurtenances and immunities thereto belonging or in anywise appertaining, unto the said party of the second part and unto his heirs and assigns forever the said Elgin U. Western and Lucy U. Western hereby covenanting that they are lawfully seized of an indefeasible estate in fee in the premises herein conveyed; that they have good right to convey the same; that the said premises are free and clear from any incumbrance done or suffered
by them or those under whom they claim; and that they will
97 warrant and defend the *the* title to the said premises unto the
said party of the second part and unto his heirs and assigns
forever, against the lawful claims and demands of all persons whomsoever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year above written.

E. U. WESTERN. [SEAL]
LUCY U. WESTERN. [SEAL]

STATE OF MISSOURI, } ss:
County of Jackson, }

On this 9th day of June, 1887, before me, a notary public in and for said county, personally appeared Elgin U. Western, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed; and the said Elgin U. Western further declares himself to be single and unmarried.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office, in Kansas City, the day and year first above written.

My term expires December 31, 1890.

[SEAL.] E. J. INGRAHAM,
Notary Public.

STATE OF CALIFORNIA, } *ss:*
County of Lake, }

On this 16th day of June, 1887, before me, J. W. Mackall, a notary public in and for said county, personally appeared Lucy U. Western, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in ——, the day and year first above written.

My term expires May 9th, 1889.

98 [SEAL.] J. W. MACKALL,
Notary Public.

STATE OF MISSOURI, } *ss:*
County of Jackson, }

RECORDER'S OFFICE.

I, R. T. Hinde, recorder of said county, do hereby certify that the within instrument of writing was, on the 14 day of Sept., A. D. 1887, at 1 o'clock 10 minutes p. m., duly filed for record in this office and is duly recorded in the records of this office in Book 278, at page 517.

In witness whereof I have hereunto set my hand and affixed the seal of said office, at K's C'y, Mo., the day and year last above written.

[SEAL.] R. T. HINDE, *Recorder*,
By A. J. HINLEY, *Deputy*.

Warranty deed from E. U. Western & Lucy U. Western to Fred. H. Long. Filed for record this 14th day of Sept., A. D. 1887, at 1 o'clock 20 minutes p. m., and recorded in Book —, at page —. R. T. Hinde, recorder, by D. W. Wallace, deputy. Recorder's fees, $1.00. Ins., 10c., paid. B. 278, p'ge 517.

99 *City Tax Deed.*

Know all men by these present: That, whereas the following-described real property, viz: Lot 13, block 2, Skiles & Western's addition situated in the city of Kansas, in the county of Jackson, and State of Missouri, was subject to taxation for the years A. D. 1865, 1869 & 1870, and whereas, the taxes assessed upon said real property for the year aforesaid remained due and unpaid at the date of the sale hereinafter mentioned; and whereas, the city collector of said City of Kansas, did, on the 8th day of January A. D. 1876, by virtue of authority in him vested by law, at (an adjourned sale) the sale began, and publicly held on the first Monday of November A. D. 1875 the first day on which said real property was advertised for sale, expose to public sale at the office of the city collector in the City of Kansas aforesaid, between the hours of ten o'clock in the forenoon and five o'clock in the afternoon, in conformity with all the requisitions of the statute in such case made and provided, the real property above described for the payment of taxes, interest and costs then due and unpaid upon said real property; and, whereas, at the place aforesaid F. H. Benson & Sons of the county of Jackson and State of Missouri having offered to pay the sum of six dollars and twenty-one cents, being the whole amount of taxes interest and costs then due and remaining unpaid on said real property for the years 1865, 1869, 1870 and which was the smallest portion bid for, and payment of said sum having been by him made to said city collector, the said property was stricken off and sold to him at that price; and whereas, the said F. H. Benson & Sons did, on the 24th day of January A. D. 1876, duly assign the certificate of purchase of the property as aforesaid, and all his right title and interest to said real property to James G. Thayer of the county of Jackson and State of Missouri; and whereas, 100 two years have elapsed since the first day on which said real property was advertised for sale, and the said property has not been redeemed therefrom, as provided by law; and whereas, the city collector of the City of Kansas aforesaid, did, at least four months before the expiration of the time limited for redeeming said real property, publish a notice as required by the statute in such case made and provided, that unless said real property was redeemed on or before the day limited therefor it would be conveyed to the purchaser or his heirs or assigns. Now, therefore, I, P. M. Chouteau city collector of the City of Kansas county and State aforesaid, for and in consideration of the sum of six dollars and twenty-one cents, taxes interest and costs due on said real property for the years A. D. 1865, 1869 and 1870 to the city collector of said City of Kansas, paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said James G. Thayer his heirs and assigns the real property last h-rein before described to have and to hold unto him the said James G. Thayer his heirs and assigns forever subject however to all the rights of redemption provided by law.

In witness whereof I, P. M. Chouteau city collector of the city of Kansas aforesaid, have hereunto subscribed my name, and affixed the corporate seal of the city of Kansas, this 9th day of November A. D. 1877.

[SEAL.] P. M. CHOUTEAU,
City Collector of the City of Kansas.

101 STATE OF MISSOURI, } ss:
County of Jackson, }

Be it known that on this ninth day of November, 1877, before me, the undersigned, a notary public within and for the county of Jackson and State of Missouri, personally came Pierre M. Chouteau, city collector of the City of Kansas, who is personally known to me to be the same person whose name as city collector of the City of Kansas is signed to the foregoing deed as a party thereto, and he acknowledged the same to be his act and deed as city collector of the City of Kansas for the uses and purposes stated in said deed. I certify I qualified as notary public on the fourth day of October, 1876, and my commission will expire on the second day of October, 1882.

In testimony whereof I have hereunto set my hand and official seal on this ninth day of November, 1877.

[SEAL.] L. J. TALBOTT,
Notary Public, Jackson County, Missouri.

STATE OF MISSOURI, }
County of Jackson. }

IN RECORDER'S OFFICE.

I, Chas. D. Lucas, recorder of deeds within and for the county aforesaid, do hereby certify that the foregoing and annexed instrument was, on the 9th day of Nov., A. D. 1877, at 12 o'clock 10 minutes p. m., duly filed for record in this office, in Book B No. 27, at page 461.

In witness whereof I hereunto set my hand and affix the seal of said office, at Kansas City, Mo., the day and year last aforesaid.

[SEAL.] CHAS. D. LUCAS, *Recorder,*
By E. F. HEDGES, *Deputy.*

102 [Endorsed:] 69. City tax deed from P. M. Chouteau, city collector of the city of Kansas, to James G. Thayer. Book B No. 27, page 461. Filed for record this 9th day of November, A. D. 1877, at 12.10 p. m. Chas. D. Lucas, recorder, by J. W. Vincent, deputy. Recorder's fees, $1.25, paid.

103 Deposition of a witness produced, sworn, and examined on the 6th day of May, in the year of our Lord 1889, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the law office of Bacon & Harnsberger, water works building, Kansas City, in the county of Jackson and State of Missouri, before me, William A. Harnsberger, a notary public in and for said county and State, in a certain case now pending in the circuit court of the United States for the western division of the western district of Missouri, between James G. Thayer, orator, and Fred. H. Long, respondent, on the part of the orator.

E. U. Western, of lawful age, being produced, sworn, and examined on the part of the orator, deposeth and saith:

Examined by Mr. **Middlebrook**:

Q. 1. Please state your name, residence, and occupation.

Ans. E. U. Western; residence, Kansas City, Missouri; my occupation is that of a lawyer.

Q. 2. Are you the Elgin U. Western whose name appears as one of the grantors in a deed to Fred. H. Long, respondent in this case, of the lot in question—lot 13, block 2, Skiles & Western's addition?

A. Yes, sir.

Q. Are you related in any way to Fred. H. Long?

Ans. In no way by blood. He is my step-father.

Q. 4. Was he your step-father at the time the deed you have spoken of was executed and delivered?

Ans. In 1886 *ot* '87—yes, sir.

Q. 5. Where did he live at that time?

Ans. In California.

104 Q. 6. Where did you live at that time?

Ans. I was at the law school—the State University.

Q. 7. At Columbia, Missouri?

Ans. Yes, sir; with the intention of making Kansas City my home, my residence.

Q. 8. Do you say it was sent to you at Columbia?

Ans. I am not positive. There were papers sent to me there. I might have signed it in Kansas City. If it was June 9th, 1887, I signed it in Kansas City.

Q. 9. Who, if anybody, represented Fred. H. Long in the transaction?

Ans. I believe that Mr. Merriwether attended to some of his business—H. M. Meriwether,

Q. 10. Is that the Mr. Meriwether of Matthews & Meriwether, attorneys in this case?

Ans. Yes, sir; the same firm.

Q. 11. State whether Mr. Meriwether is related to you in any way.

Ans. He is my brother-in-law—married my sister.

Q. 12. What was her name before marriage?

Ans. Lucy U. Western was her maiden name.

Q. 13. State whether or not your sister that you have spoken of is the same person mentioned in the deed to Fred. H. Long as one of the cograntors to him.

Ans. Yes, sir; she is. We both sold our interests to Mr. Long.

Q. 14. Did you receive any letters from Mr. Long regarding this matter or did Mr. Meriwether act for Mr. Long?

Ans. Mr. Meriwether attended to the matter. There was no correspondence between Mr. Long and myself with regard to this matter. Mr. Meriwether was my agent and that of my sister.

Q. 15. Do you remember when your mother was married to Mr. Long—what year?

105 Ans. I remember that it was in July, in Santa Cruz, California, in 1885 or 1886. I am positive; I cannot be more positive. It was in July—I remember that date—in 1885 or 1886.

—. Did you or did you not ever live together subsequent to the marriage—in the same family or household?

Ans. We boarded in the same house together a short time in San Francisco. I was there a short time.

Q. 17. Give the date.

Ans. Shortly after the marriage. I was there in 1885—the latter part of 1885 and the commencement of 1886.

Q. 18. At the time that this deed was made, when you say that Mr. Meriwether was representing Mr. Long, do you know whether there had been any suits conducted by Mr. Meriwether in which the title to this lot in Skiles & Western's addition had come up was discussed?

Ans. I am not able to say; I was not here prior to that.

Q. 19. What was the actual consideration for the deed from yourself and sister to Mr. Long?

Ans. We took as consideration his promissory note for forty and some odd hundred dollars. I don't exactly know now. I was advised to sell by Mr. Meriwether, who was my agent in the matter—my own special adviser—being a fraternity man of mine.

Q. 20. Have you got that note?

Ans. No, sir; the note is in the possession of Mr. Meriwether. It is not due yet, I don't think.

Q. 21. How much is it for?

A. Forty and some odd hundred dollars—it is $4,900.

Q. 22. Do you know when it comes due?

Ans. I do not, sir, know the exact date. Two years from its date or something of that sort, I think.

106 Q. 23. Do you know to whom it is payable?

Ans. It is payable to us—my sister and myself.

Q. 24. Was that note secured by a deed of trust on the property?

Ans. I believe it was. Mr. Meriwether attended to the whole transaction for me as my agent.

Q. 25. Do you know positively that that was the case?

Ans. I will state that he having attended to other business for me satisfactorily I suppose it was done properly. I don't know. I was not here when the transaction was made. I might have been here and signed the deed.

Q. 26. Was there any understanding at the time that that note should not be used, transferred, or sold, or negotiated?

Ans. No, no understanding, nothing of the sort. I knew that Mr. Long was good. Was advised to make the transfer because a man by the name of Thayer had bought a tax deed against said property repudiating a former contract for the purchase thereof, as I was informed by my agent, which was the reason—one of them—that we sold it.

Q. 27. If it had not been for that sale and purchase under a tax deed, as far as you now know, would you have made the sale?

Ans. I would have sold it, as I think we got a fair price for the property, to him, because he was perfectly good. I think the price was fair.

Q. 28. In the event of the successful termination of the suit in ejectment, now temporarily enjoined, in the United States circuit court, wherein Fred. H. Long is plaintiff and James Thayer is defendant, and a judgment of that court in favor of Mr. Long is rendered, would you in any way be benefited thereby?

Ans. In no way, except that I gave my warranty deed for the lot. I was a *bona fide* sale. That is the only benefit I would derive from it.

107 Q. 29. Is there any arrangement of any kind between you and Mr. Meriwether or between your sister and Mr. Meriwether and Mr. Long by which this note, held now by Mr. Meriwether, to which you have just referred, for $4,900 should be held by Mr. Meriwether and not used by yourself and your sister?

Ans. None at all—none whatever. The reason Mr. Meriwether holds the note is because his wife, who is my sister, is interested—owns half of it. He has my perfect confidence. He has an interest in the note, of course, my sister being his wife. That is the reason he has it.

Q. 30. Was there any cash paid at all outside of the note?

Ans. Nothing beyond the note that I am aware of, sir, which I deemed was sufficient.

Q. 31. Have you ever received any payments of interest on that note?

Ans. I have not. I don't think there is any due, except for the first year. Mr. Meriwether may have received some. I don't know about that. I have not received any interest on it.

Q. 32. Have you ever made any demand for interest?

Ans. No, sir.

Q. 33. Where is the note payable?

Ans. Payable at some of the banks. I believe the National Bank of Kansas City—usually made payable there—or the Bank of Commerce, where he did this business. I don't know.

Q. 34. Is it now due?

Ans. No, sir; I think not.

Q. 35. When does it become due?

Ans. This spring, I think. I don't know the exact date. In June, I think.

Q. 36. From whom did you first hear that Mr. Long wanted to purchase this lot?

Ans. From my agent, Mr. Meriwether.

108 Q. 37. When you sold this property to Mr. Long did Mr. Meriwether examine the title for you?

A. Yes, sir; he examined the title for him.

Q. 38. Do you know that to be the case?

Ans. I know that he was attending to business here for my mother and Mr. Long. I presume he did. I don't know whether he examined it or not. He might have had some one else to do it.

Q. 39. Can you say whether or not before that time Mr. Meriwether had attended to any of these cases in litigation in Skiles & Western's addition?

Ans. I can say he attended to some business in Wyandotte for my mother. He was her agent. I know that he was attending to business for my mother. I don't know whether he brought suit for her or not at that time. I know he was attending to business for my mother at the time of the sale and to the extent of Long's interest in my mother's affairs as her husband, for him also.

Q. 40. In Skiles & Western's addition?

Ans. Yes, sir.

Q. 41. When did he marry your sister, if you remember?

Ans. On the 28th day of September, 1887, at Grace church, San Francisco.

Q. 42. Do you know of a condemnation proceeding pending in the circuit court of Jackson county, Mo., wherein James G. Thayer, the orator in this case, and Fred. H. Long, as your grantee, were made parties defendant and the sum of $2,000 paid into court to be paid to whoever should turn out to be the owner of this ground?

Ans. I believe there is such a case, sir.

Q. 43. Do you know whether this suit in ejectment in the Federal court, wherein Fred. H. Long is plaintiff and James G. Thayer defendant, to enjoin which this suit in chancery was brought, had been instituted before or after these condemnation proceedings were commenced?

109 Ans. I don't know, sir.

Q. 44. Do you know whether or not Mr. Meriwether had an abstract of title, as attorney for Mr. Long, of lot 13, block 2, Skiles & Western's addition, at the time you sold to Mr. Long?

Ans. I believe he did. I am not positive. He had several abstracts pertaining to that addition at the time of the sale.

Q. 45. Did you ever in company with him examine them?

Ans. No, sir; not with regard to this lot. I have with regard to other lots down there.

Q. 46. Did you ever examine the abstract of title to this lot with Mr. Meriwether with reference to this contract of sale?

Ans. I never examined it with him, but I remember of conversation with him with regard to that.

Q. 47. With regard to the contract of sale from Skiles & Western to Thayer of lot 13, block 2, Skiles & Western's addition?

Ans. I had some conversation with him.

Q. 48. Was that conversation with him prior to the bringing of the ejectment suit?

Ans. It was about the time of the sale of the lot to Mr. Long.

Q. 49. Prior to the sale of it?

Ans. Yes, sir.

Q. 50. State, if you can, whether Mr Meriwether knew prior to the purchase of that lot by Mr. Long about this contract of sale to Mr. Thayer.

Ans. I cannot tell positively. I think he must have known, because he said there was — tax deed bought by Thayer in order to make the contract stronger, which he took as a repudiation of the contract.

Q. 51. He spoke of it in that connection?

Ans. I believe he did. That was the reason I had for selling the lot, thinking that would make my title better—for selling
110 purposes better.

Q. 52. You said, if I understood you correctly, that Mr. Meriwether said to you that this contract, he thought, was repudiated by the tax deed of Mr. Thayer?

Ans. That is was void for that reason.

Q. 53. He thought that buying the tax deed repudiated the contract?

Ans. Yes, sir.

Q. 54. That was in conversation with Mr. Meriwether?

Ans. I believe it was, or by letter. I cannot swear which way it was.

Q. 55. Was that before you made the deed to Mr. Long?

Ans. Yes, sir.

Q. 56. Was Mr. Meriwether then acting as attorney for Mr. Long?

Ans. I don't know whether he was acting as attorney for Mr. Long. He was acting as agent for me.

Q. 57. Did he draw the papers for Mr. Long?

Ans. I think he did.

Q. 58. Do you know whether he was acting as his adviser and counsel in the purchase?

Ans. I don't know. I think he must have been, as he negotiated the sale.

Q. 59. You had no direct communication with Mr. Long, by letter or otherwise, with regard to the purchase or sale of this lot?

Ans. No, sir.

Q. 60. I believe you said that Mr. Meriwether transacted the business in such a way that you did not have anything to do with it only through him?

Ans. That is all, sir.

Q. 61. Are you a judge of the value of land down there now—what it is worth?

Ans. I have some idea of its value.

111 Q. 62. Are you acquainted with the lay of the ground—the way it lies down there—and how much it is selling for?

Ans. To some extent; yes, sir.

Q. 63. What, in your opinion, is lot 13, block 2, Skiles & Western's addition, worth?

Ans. About $5,000; I suppose, between $4,500 and $5,000.

Cross-examination by Mr. Matthews:

Q. 1. After reflection on the matter, what is your best judgment as to the date of the deed from your sister and yourself to Mr. Long?

Ans. As I said before, it was in June some time of 1887; the exact date I would not like to state on oath. It was in June; I don't know the exact date—somewhere from the first to the last of

June. I refer you to the deed, which I understand is in evidence, as the best evidence.

Q. 2. The property that you spoke of that Mr. Meriwether had in charge for Mrs. Long, your mother, was that in Skiles & Western's addition or not?

Ans. He had charge of some interest for my mother in Wyandotte, State of Kansas, county of Wyandotte.

Q. 3. Was that your reason for supposing that he might also be attorney for Mr. Long in this transaction for the lot in controversy?

Ans. I didn't mean to say that he was attorney for Mr. Long; he was my agent. He first broached the sale.

Q. 4. Was that your reason for believing he was his attorney?

Ans. Yes, sir; he was my mother's attorney. That was the reason he was attending to this business.

Q. 5. Do you mean to state that he was attorney for Mr. Long in the transaction with regard to the purchase of lot 13, block 2, Skiles & Western's addition?

Ans. No, sir; I did not mean to state he was his attorney.

112 Q. 6. Or his agent?

Ans. No, sir; he was my agent. He was the man that got up the trade and acted as my agent. I presume he had some correspondence with Mr. Long with regard to the price.

Redirect examination by Mr. MIDDLEBROOK:

Q. 1. Did any other attorney, as far as you know, represent Mr. Long in the transaction?

Ans. I think not, so far as I know. The price was submitted to him by my agent; that is all I know. He accepted it and we made the deed.

Q. 2. Do you wish to correct or qualify in any way the fact that the deed of conveyance from yourself and sister to Mr. Long was in the handwriting of Mr. Meriwether?

Ans. No, sir; I think it was. He writes a good hand and generally wrote the deeds of my own conveyances, not only of that lot but of some others.

Q. 3. Who has paid the taxes on that lot for the past two years?

Ans. I presume Mr. Long has. I have not.

Q. 4. Did you ever pay any taxes on it?

Ans. My guardian may have done so; I never did.

Q. 5. Can you state whether or not this $4,900 note was secured by deed of trust?

Ans. I stated in regard to that matter once.

Q. 6. What did you state?

Ans. I stated that I did not know positively.

Q. 7. You haven't any such deed of trust?

Ans. Not in my possession; Mr. Meriwether has all the papers in the transaction.

ELGIN U. WESTERN.

Subscribed and sworn to before me on the day, at the place, and within the hours first aforesaid.

[SEAL.] WILLIAM A. HARNSBERGER,
Notary Public.

113 I, William A. Harnsberger, a notary public within and for the county of Jackson, in the State of Missouri, do certify that in pursuance of agreement of parties, came before me, at the office of Bacon and Harnsberger, room 51 Water Works building, in Kansas City, in the county and State last aforesaid, E. U. Western, who was by me sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined and his examination reduced to writing in short-hand by W. R. Sellon, stenographer, and by him transcribed into long-hand, and subscribed by said witness in my presence, and his said deposition is now herewith returned; and I further certify that said witness is a resident of the county of Jackson, in the State of Missouri.

Given, at Kansas City, in the county of Jackson and State of Missouri, this 6th day of May, 1889.

[SEAL.] WILLIAM A. HARNSBERGER,
Notary Public for Jackson County, Missouri.

114 Deposition of a witness produced, sworn, and examined on the 7th day of May, in the year of our Lord 1889, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the law office of Matthews & Meriwether, in the City of Kansas, in the county of Jackson and State of Missouri, before me, R. B. Middlebrook, a notary public within and for the county and State aforesaid, in a certain cause now pending in the circuit court of the United States for the western division of the western district of Missouri, between James G. Thayer, orator, and Fred. H. Long, respondent, on the part of the orator.

Mrs. LUCY W. MERIWETHER, of lawful age, being produced, sworn and examined on the part of the orator, deposeth and saith:

Examined by Mr. MIDDLEBROOK:

Q. 1. Please state your name and residence.

Ans. Mrs. H. M. Meriwether; Kansas City, Missouri.

Q. 2. Please state your maiden name—your name before you were married.

Ans. Lucy Underwood Western.

Q. 3. Are you a sister of Elgin U. Western?

Ans. Yes, sir.

Q. 4. Are you the daughter of the late W. W. Western, deceased?

Ans. Yes, sir.

Q. 5. Do you know whether, with your brother, E. U. Western, you deeded to Mr. Fred. H. Long lot 13, in block 2, Skiles & Western's addition—that lot about which we are having a suit?

Ans. I don't know; I left it all to my husband. I suppose if I signed the deed, that is the lot. I don't know the number of the lot or anything about it.

Q. 6. Do you remember about the time that you signed the deed—how long ago it was?

115 Ans. If I signed that deed, I don't know when, because I signed a good many different deeds. If I could see the deed I could tell. If I signed it, of course, I didn't read the deed; I simply trusted to my husband. If you all say I signed it I have; that is all there is about it.

Q. 7. Were you married at the time the deed was signed?

Ans. That I don't know. I know I was married in 1887—the 28th of September. If I signed the deed before that, of course, I was not married.

Q. 8. Where were you living at the time you signed the deed, if it was signed in June, 1887?

Ans. I was in San Diego in June. I was somewhere in California. I think it must have been in San Diego.

Q. 9. Who were you with? Traveling around there, were you?

Ans. If I was in San Diego I was with my mother and father; but I don't know the exact deed you are speaking of.

Q. 10. If it was signed in June, I ask you where you were in June?

Ans. I was either in Lakeport, California, or in San Diego.

Q. 11. You have stated that you were with your father and mother. Do you mean Mrs. and Mr. Fred. H. Long?

Ans. Yes, sir; that has been so long ago that I don't remember where I was.

Q. 12. Who presented the deed to you for your signature, if you remember?

Ans. Of course, it was sent from here.

Q. 13. Who sent it?

Ans. Mr. Meriwether, I think, sent it. You see I don't know anything about business affairs.

116 Q. 14. Did the deed come by mail?

Ans. Yes, sir; it must have done so; of course it did.

Q. 15. Did it come to you or to Mr. Long?

Ans. To Mr. Long. They wouldn't send it to me. I would not know what it was for.

Q. 16. Who was Mr. Meriwether acting for in making the deed and transacting the business?

Ans. For my brother——

Q. 17. Do you know who he was acting for?

A. I don't know who he was acting for.

Q. 18. Have you had any correspondence with him about it?

Ans. I had given it to my brother's care. I don't know anything about these things. If there was anything to give, they didn't consult me about it, for I didn't know anything about it.

Q. 19. You were a young girl, getting your education; going to school, weren't you?

Ans. I hadn't been out of school very long. I wasn't attending to any such things. If such things came I would sign them.

Q. 20. Did you get any money from Mr. Long at the time you signed the deed?

Ans. That I don't know.

Q. 21. On account of signing the deed, I mean.

Ans. I don't know. I don't think I received any money.

Q. 22. Was Mr. Long at that time taking charge of your affairs for you in any way?

Ans. In California only.

Q. 23. Do you remember when Mr. Long and your mother were married?

Ans. Yes, sir; they were married on the 27th of July—when was it?—it was the year I graduated, 1885.

117 Q. 24. Where were they married?

Ans. At Santa Cruz, California.

Q. 25. Did Mr. Long and your mother after they were married live in Kansas City, Mo.?

Ans. They were here for quite a long while, when they came East after they were married.

Q. 26. Did they live here or come here on a visit? Did they settle down here to live or come here on a visit? Was it their intention to make this their home?

Ans. I don't think it was.

Q. 27. Did you ever see any note made out to you for $4,900 for the purchase of this lot by Mr. Long?

Ans. It seems to me that I have. I don't know. I couldn't tell you to save me for sure whether I have or not, but it seems to me that I have.

Q. 28. Have you got any such note as that in your possession?

A. Oh, no. If there is any, Mr. Matthews or Mr. Meriwether has it. I think I have seen it. I wouldn't swear to that as a downright statement, but I think I have.

Q. 29. Do you know whether at the time that this sale took place Mr. Meriwether was acting as attorney for Mr. Long?

Ans. I think he was.

Q. 30. What makes you think so?

Ans. Of course, when I say for Mr. Long—mother was Mr. Long's wife, you know, and Mr. Meriwether was mother's attorney and my brother's attorney and my attorney, as far as I had anything to do with it.

Q. 31. Do you know who did attend to Mr. Long's affairs?

Ans. No, sir.

Q. 32. Do you know of his having any other attorney besides Mr. Meriwether?

Ans. No; I don't know at all.

Q. 33. Do you know whether Mr. Long ever saw this lot—whether he ever went out and looked at it?

118 Ans. I don't know. He was in Kansas City once.

Q. 34. When was the first you heard that he wanted to buy it?

Ans. Well, I don't know.

Q. 35. What called your attention to it—that he was buying it?

Ans. What I heard them talk about it.

Q. 36. Who did you hear talk about it?

Ans. I don't know. If he mentioned it to me I didn't take any note of it, knowing that it would be all right. I had such implicit confidence in my father, if he said go and sign a deed, I did. If the lawyers sent me a deed I knew I ought to sign it. If there was any talk about it I suppose I must have heard that.

Q. 37. Do you remember whether the deed that was sent to California for you to sign was sent to you or Mr. Long by Mr. Meriwether—which one of you he sent it to *to?*

Ans. No; I don't remember. I don't know. It is a long time ago to remember such insignificant things as that. I didn't pay any attention to such things.

Q. 38. Was Mr. Meriwether acting for you in your affairs before you were married?

Ans. As far as we knew, he was.

Q. 39. Was he acting for your mother, as her attorney, after she was married to Mr. Long?

Ans. I think so. I don't know. They never took me into their conference; knew I wouldn't know anything about it.

Q. 40. When you say "they" whom do you mean?

Ans. Mr. Meriwether wouldn't talk to me about such things at that time. I know my mother always intended Mr. Meriwether to attend to her affairs—always intended him to attend to mine.

Q. 41. Do you know who did have charge of making sale of this lot?

119 Ans. No; I do not.

Cross-examination by Mr. Matthews:

Q. 1. Please state the day and year of your birth.

Ans. The 12th of November, 1867.

Q. –. Please state, in like manner, the date and year of your brother, E. U. Western's, birth?

Ans. The 4th of September, 1865.

Q. 3. When you said in your examination-in-chief that you thought Mr. Meriwether was Mr. Long's attorney, state exactly what you meant.

Ans. I knew that Mr. Meriwether was mother's attorney; and, generally, isn't the attorney of the wife the attorney of the husband, too? That is all the reason for stating so.

Mrs. H. M. MERIWETHER.

Subscribed and sworn to before me—

[SEAL.] ROBERT B. MIDDLEBROOK,
Notary Public for Jackson County, Missouri.

Com. expires Sept. 7th, 1891.

I, R. B. Middlebrook, a notary public within and for the county of Jackson, in the State of Missouri, do certify that in pursuance of agreement of parties came before me, at the office of Matthews &

Meriwether, in Kansas City, in the county and State last aforesaid, Lucy W. Meriwether, who was by me sworn to testify to the whole truth, of her knowledge, touching the matter in controversy aforesaid, and that she was examined and her examination reduced to writing in short-hand by W. R. Sellon, stenographer, in my presence, and by him transcribed into long-hand and subscribed by said witness, and her said deposition is now herewith returned.

120 Given at Kansas City, in the county of Jackson and State of Missouri, this 7th day of May, 1889.

[SEAL.] ROBERT B. MIDDLEBROOK,
Notary Public for Jackson County, Missouri.

121 And afterwards, to wit, on the 10th day of February, A. D. 1891, the following order was made and entered of record in said cause, to wit:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

AT CHAMBERS, TUESDAY, *February 10th*, 1891.

JAMES G. THAYER
ag'st
FRED. H. LONG.

This day comes defendant, by his solicitors, and prays an appeal from the order and decree by this court rendered in the above cause, and tenders his appeal bond in the sum of $500, to operate as a supersedeas herein. Whereupon it is ordered that said prayer be granted and an appeal allowed, and that said bond be approved, to act as a supersedeas of said order and decree, except as to the order for injunction.

(Signed) JNO. F. PHILIPS,
U. S. Dist. Judge.

122 Said bond for appeal is in words and figures as follows:

UNITED STATES OF AMERICA, *sct:*

Know all men by these presents that we, Fred. H. Long, as principal, and Gilmer Meriwether and E. U. Western, as sureties, are held and firmly bound unto James G. Thayer, his executors and administrators, in the sum of five hundred dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this — day of ——, A. D. 18—.

Upon this express condition, to wit: Whereas the above-named Fred. H. Long has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the cause above named by the circuit court of the United States for the western division of the western district of Missouri: Now, if the above-named Fred. H. Long shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

FRED. H. LONG, [SEAL.]
By MATTHEWS & MERIWETHER,
His Attorneys.
GILMER MERIWETHER. [SEAL.]
E. U. WESTERN. [SEAL.]

Signed and sealed in presence of—
—— ——.

The above bond is hereby approved and ordered to be filed and made a part of the record.

—— ——, *Judge.*

123 UNITED STATES OF AMERICA,
Western District of Missouri, } *ss:*

Gilmer Meriwether, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein and is worth, over and above all his debts and liabilities, the sum of two thousand dollars, and that he owns personal and real property to that amount subject to execution in the State of Missouri.

—— ——.

Subscribed and sworn to before me this 4th day of February, A. D. 1891.

[SEAL.] JOHN M. RAGLAND,
Notary Public.

124 UNITED STATES OF AMERICA, *sct:*

I, Warren Watson, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the foregoing is a true and complete transcript of record in the cause therein named as fully as the same appears in my office.

Seal of the United States Circuit Court for the Western District of Missouri, Western Division

Witness my hand as clerk and the seal of said court. Done at office, in the City of Kansas, Missouri, this 10th day of April, A. D. 1891.

WARREN WATSON, *Clerk,*
By —— ——, *D. C.*

125 In the Supreme Court of the United States.

Appealed from the United States Circuit Court for the Western Division of the Western District of the State of Missouri, Sitting in Equity at Kansas City.

JAMES G. THAYER, Plaintiff,
vs.
FRED. H. LONG, Defendant.

Affidavits—Value Over $5,000.

Thomas F. Blakemore, being first duly sworn, says—

That he resides in Kansas City, State of Missouri, and his business is that of a real-estate agent, and he has been engaged in that business for several years just passed, in said city; that he knows the property in controversy, to wit, lot 13, block 2, Skiles & Western's addition to said city. Said lot has now a front of 25 feet on Wyoming street, and as originally laid off it ran back between parallel lines 126 feet to an alley. It is poorly improved, having on it only a small frame dwelling-house worth about $250.00 or $300.00. The whole of the lot as originally laid off, without any improvements, is worth $225.00 per front foot, or $5,625.00 for the whole lot. Between 20 and 30 feet have recently been cut off of the rear end of the lot for railroad purposes, and in the condemnation proceedings the part cut off as aforesaid was adjudged to be worth $2,000, and that amount of money was paid into court by the railroad for the benefit of whoever might prove to be the owner, as affiant is informed and as he believes. What is left of the lot after what
126 was cut off from the rear end is worth $3,625.00. All of the above-mentioned values have been about the same as they now are for the last twelve months just preceding the date of this affidavit.

T. F. BLAKEMORE.

Subscribed and sworn to before me this 20th day of Nov., 1889. My term expires July 23rd, 1893.

[Seal John M. Ragland, Notary Public, Jackson County, Mo.]

JOHN M. RAGLAND,
Notary Public.

Elza R. Roe, being first duly sworn, says that he is a real-estate agent, residing and doing business in Kansas City, State of Missouri, and has resided in said city and has been engaged in said business for some years just passed. Affiant knows the property in controversy, to wit, lot 13, block 2, Skiles & Western's addition to said city. It is situated in that part of said city commonly known as the bottoms, or the west bottoms, which is principally devoted to the terminal facilities of the railroads that run into Kansas City and the wholesale mercantile houses, stock yards, packing-houses, etc. Said lot as originally laid off was 126 feet deep, with a front-age of 25 feet on Wyoming street. About 20 or 25 feet have recently been cut off the rear end of said lot next to the alley for railroad purposes, in certain condemnation proceedings in the circuit court of Jackson county, Missouri, and in those proceedings the part cut off was adjudged to be worth $2,000.00, as affiant is informed and believes. The remainder of the lot, to wit, 25 feet front by about 100 feet deep, is worth about $5,625.00 (five thousand six hundred & twenty-five dollars) without any improvements whatever.

127 The improvements on the 25 by about 100 feet consists of a small frame dwelling-house worth about $250.00.

All of the above-mentioned values have remained about as they now are during the whole of the present year, A. D. 1889.

E. R. ROE.

Subscribed and sworn to before me this 21st day of November, 1889. My term expires July 23rd, 1893.

[Seal John M. Ragland, Notary Public, Jackson County, Mo.]

JOHN M. RAGLAND,
Notary Public.

128 In the Supreme Court of the United States of America.

Appealed from the United States Circuit Court for the Western Division of the Western District of the State of Missouri, Sitting in Equity at Kansas City.

James G. Thayer, Complainant,
vs.
Fred. H. Long, Respondent.

Affidavit of Hinton H. Noland, Clerk of the Circuit Court of Jackson County, State of Missouri.

Hinton H. Noland, being first duly sworn, says that he is clerk of the circuit court of Jackson county, Missouri, and has been clerk of said court since the first day of December, A. D. 1889; that his immediate predecessor in said office was L. F. McCoy, who held and filled said office for nearly seven years just next preceding December 1st, 1889. Affiant further says that there is now on special deposit in affiant's hands as clerk of the circuit court of Jackson county the sum of twenty-one hundred and twenty-five dollars, which deposit was made by the Kansas City & Topeka R. R. Company on the 6th day of June, 1888, in the case of The Kansas City & Topeka R. R. Company *vs.* James G. Thayer, Fred. H. Long, and Juliette Long. That case was a proceeding to condemn private property for public use, to wit, thirty (30) feet off of the rear end or west end of lot No. 13, block 2, Skiles & Western's addition to Kansas City, Mo., for the purposes of said railway company. Said thirty (30) feet was accordingly so condemned and said $2,125 was deposited in court by said railway Co. in consideration of and

129 payment for said 30 feet cut off of said lot for the benefit of said Thayer or said Long and wife, as their interests might ap-

pear. Subsequently the clerk of said court received the following notice, to wit:

P. E. Hatch. R. B. Middlebrook.

Hatch & Middlebrook, attorneys- & counsellors-at-law, Delaware block.

No. 11873.

Kansas City, *Dec. 4th*, 1888.

L. F. McCoy, clerk.

Dear Sir: There is some $2,000 money into court in the condemnation case of Kansas City and Topeka R. R. Co. *vs.* James G. Thayer *et al.*, No. 11873. There are some cases pending in the Federal court between Fred. R. Long and James G. Thayer. In one of these cases a stipulation was filed with you that you should pay the $2,000 to the successful party in that suit. Since then other proceedings have been instituted in the Federal court between the same parties, and you will please not turn over the $2,000 until we consent thereto in writing.

Yours respectfully, HATCH & MIDDLEBROOK.

And said special deposit of $2,125 still remains in affiant's hands as said clerk awaiting the termination of said litigation in the Federal court between said Thayer and said Long.

HINTON H. NOLAND.

Subscribed and sworn to before me this 9th day of December, 1889. My term expires July 23rd, 1893.

[Seal John M. Ragland, Notary Public, Jackson County, Mo.]

JOHN M. RAGLAND,
Notary Public.

Endorsed on cover: Case No. 14,635. W. Missouri C. C. U. S. No. 748. Fred. H. Long, appellant, *vs.* James G. Thayer. Filed May 12, 1891.

Office Supreme Court U. S.
FILED.
NOV 16 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

FRED. H. LONG, Appellant,
vs.
JAMES G. THAYER.
No. 471.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

BRIEF FOR APPELLANT.

This was a bill of complaint in chancery, wherein James G. Thayer was complainant and Fred. H. Long was respondent.

In the bill it was alleged that in October, 1887, appellant sued one Townsend R. Smith in ejectment for the possession of certain property in Kansas City, Missouri; that subsequently appellee was made party defendant (Rec., 2); that to this cause appellee had an equitable defense, which he pleaded therein, which was in substance this: Appellee averred, in the ejectment suit, that appellant was the grantee of the sole heirs of W. W. Western, deceased, by deed of ———, 1887; that prior to his death Western and one Skiles made a contract with appellee for the sale of the property sued for in ejectment by appellant

(Rec., 2); that the original of the contract was duly recorded on April 12, 1875; that appellant purchased the property in question long subsequent to the recording of the contract; that appellee kept and fully performed all duties and obligations allotted to him to keep and perform by said contract, and fully paid off and discharged all notes mentioned therein; that Western died before maturity of the last note, and appellee paid note to J. F. Kinney as agent of Skiles and Western; that Western made no deed of property in question to appellee, and Skiles would make none (Rec., 2); that on June 13, 1870, appellee took possession of property in question, under his contract, and since that time had made valuable improvements on the same, not knowing of any adverse claim until the ejectment suit was begun; that appellee had no remedy at law; that Western during his life received from Kinney full payment of his share of the proceeds of the sale of property in question; that appellant purchased property in question from the heirs of Western—the heirs having acquired title through a partition suit in the Circuit Court of Jackson County, Missouri (Rec., 3); appellee prayed specially for writ of injunction to restrain appellant from further proceeding at law against appellee, and for writ of subpœna, commanding appellant to appear and show cause why appellee should not have the relief prayed for, and appellee prayed also that the property in question might be decreed to be held in trust by appellant for appellee, and for such other relief as to the court might seem just, proper, etc. (Rec., 3–4.) Application for a restraining order, as prayed in the bill, was made, and granted on December 3, 1888 (Rec., 4); on December 11, 1888, motion of appellant to dismiss the bill was overruled, but pending hearing of the same, appellee, at the court's suggestion, amended his bill by offering on the face of the bill to confess judgment in the ejectment suit; and by alleging that the Western heirs acquired all legal title to the land in controversy under a partition suit of Western *et al.* *v.* Skiles *et al.* in the Circuit Court of Jackson County, Missouri, in 1873 (Rec., 6).

Appellant made answer to the bill, and admitted certain allegations therein; but he denied that the contract of sale, if any had been made as alleged, was duly recorded; that appellee kept and performed all duties and obligations allotted to him to keep by such contracts, or that he paid off all and every note as alleged; that appellee paid the last of the notes to J. F. Kinney, as the agent of H. H. Skiles and W. W. Western; did not know whether appellee went into possession of the land in question; denied that Western received from Kinney full payment of Western's share of the proceeds of sale of the land; appellant alleged that appellee had been guilty of laches in delaying for nineteen years to endeavor to enforce his claim, and should be repelled from a court of equity; and appellant set up such laches as a bar to appellee's action (Rec., 8); that on January 24, 1876, after the execution of alleged contract, appellee repudiated the same, and purchased a pretended tax title on the land, and held the same, from that time, under his pretended tax title and not under the alleged contract (Rec., 9); that by the terms of the alleged contract it was provided that "a failure to pay either of the notes at maturity shall forfeit this contract;" that appellee did not pay, at maturity, the first or second notes (Rec., 10); appellant prayed to be dismissed with costs (Rec., 11); appellee made replication to the answer and averred that he would prove his bill to be true; that the answer was uncertain and indefinite (Rec., 12); appellant moved to discharge the order and dissolve the temporary injunction (Rec., 12); and appellee moved the court to continue the restraining order until final determination of the equity suit (Rec., 13), which latter motion was granted, and the order issued (Rec., 13). On

September 20, 1889, a decree was entered denying appellant's motion to dissolve the injunction and making the injunction perpetual upon Thayer's placing into the registry of the court $126.25, with interest at 10 per cent. from June 30th, 1870; also that appellant place in the registry of the court deeds conveying to appellee the interests of the Western heirs, and a quit-claim deed of his own interest in the land in controversy; an appeal to this court was prayed and granted (Rec., 14).

On the trial of the cause appellee, Joel F. Kinney, and Charles W. Evans were examined in behalf of appellee and the following testimony was given:

Appellee testified that he was in possession of the land in question, and had been since 1870; that the contract referred to in the pleadings was duly executed and properly filed; that he had made improvements upon the land to the amount of $490; that he paid in all $317.50 for the land—$50 when the contract was made, $102.50 on September 13, 1870, $165 on June 13, 1871, with ten per cent. interest; that the land rented for ten dollars per month; that at the final settlement Kinney informed him that Western had died, and that he, Kinney, could not make a deed for a dead man; that he bought the tax title to the land from Benson & Sons (Rec., 15–22).

J. F. Kinney testified that at the time he sold the land in question to appellee he was acting as attorney in fact for Western, with full authority to sell and dispose of the land, and with verbal authority from Skiles to sell his half interest in the land; that he received full payment for the land from appellee; that he made no efforts to take out letters of administration on Western's estate; that his brother gave appellee receipt for $102; that Western was indebted to him at time of his death. (See his testimony and a statement of account in full, Rec., 23–34, and 44.)

Charles W. Evans testified that ten dollars per month was a fair average for the land in question; that he acted as agent for appellee during ten or twelve years; that the land was occupied about ten months of the year during his agency (Rec., 34–35).

The errors committed by the court below were: 1st, in granting an injunction at all; 2d, in not dissolving the injunction on the coming in of the answer; 3d, in not dismissing the bill on final hearing, and not allowing Long to enforce his judgment in ejectment.

The appellee's equity herein rests upon the fact "that he kept and fully performed all duties and obligations allotted to him to keep and perform by the alleged contract of sale, and fully paid off and discharged all and every note mentioned therein, according to time, date, and tenor;" the answer flatly and fully denied this allegation.

It is an almost universal practice to dissolve the injunction where the answer fully denies all the circumstances upon which the equity of the bill is founded.

Adams' Eq., 195 (7 Am. edn.), note 1, and cases cited.

Although the appellee in his bill prayed that appellant might answer the same, but not under oath, which was expressly waived, yet, for the purpose of dissolving the injunction, the appellant had the right to swear to his answer, and sworn to it was evidence on the application to dissolve.

Dougherty v. *Topping, 4 Paige, 94–95;*
Manchester v. *Dey, 6 Paige, 295;*
Lockhart v. *City of Troy, 48 Ala., 579;*
Lytton v. *Steward, 2 Tenn., ch. 586;*
Clements v. *Moore, 6 Wall., 299;*
3 Green. Ev., sec. 286 et seq., and notes;
Amendment to 41st Rule, Sup. Ct. (1871);
Woodruff v. *Dubuque, etc., R. R. Co., 30 F. R., 91.*

The facts of this case were peculiarly and entirely within the knowledge of Thayer, and they had all been canvassed in the ejectment suit; however, it was not developed in that suit that the $102.50 had not been paid to J. F. Kinney on September 15, 1870, but to his brother, William C. Kinney; and Thayer suppressed that fact in his bill, and swore positively that the money was paid to J. F. Kinney, and by that swearing obtained an injunction.

The order should have been discharged because obtained on a false statement of material fact.

2 Dan. Ch. Prac. (5th ed.) 1664 and 5;
Kemphill v. *McKenna, 3 D. R. & W. A. R., 183;*
Spurgeon v. *Hooker, 1 DeG. & S., 484;*
Castelli v. *Cook, 7 Hare, 89, 94;*
Dalgish v. *Jarvie, 2 McM. & G., 231;*
Pinchin v. *London, &c., R'y, 5th DeG. M. & G., 851;*
Phillips v. *Prichard, 1 Jur. N. S., 750;*
Hendicott v. *Mathis, 1 Stockt. Eq., 110;*
Black v. *Huggins, 2 Tenn. Ch., 780.*

All of Kinney's power was completely revoked by Western's death, and payments to him thereafter were utterly void, and would have been so even if he had had no notice before the payments (which is not the fact) of that death and the consequent termination of his agency.

Hunt v. *Rousmanier, 8 Wheat., 174;*
Galt v. *Galloway, 4 Pet., 332;*
2 Kent. Com. (13 edn.), 646;
Mechem on Agency, secs. 239–247;
Note to Cassidy v. *McKenzie, 39 Am. Dec., 76–81.*

One of the payments for the property in question was made by appellee to one *W. C. Kinney*, brother of J. F. Kinney, the alleged agent of Western. This payment was absolutely without authority; appellee did not know W. C. Kinney as agent of Western, but on the contrary, the power of attorney from Western to J. F. Kinney was of record, and appellee was bound to take notice that by such instrument J. F. Kinney *alone* was appointed agent. Besides, J. F. Kinney had no power to delegate his authority, if any he possessed, to his brother, or to any one else.

"*Delegatus delegare non potest.*"
Broom Leg. Max. (*8 edn.*), *840 et seq.*;
2d Kent Com., *633*.

See especially—
Shankland v. *City of Washington*, *5 Pet.*, *390*;
Warner v. *Martin*, *11 How.*, *209*;
1 Parsons' Cont. (*7 edn.*), *83*.

J. F. Kinney's deposition (Rec., 23), together with the account exhibited therewith (Rec., 44), shows that prior to September 13, 1870, on which day Thayer handed to W. C. Kinney $102.50, he (J. F. Kinney) was indebted to Western, viz.: (Western died July 9, 1870.)

The account annexed to J. F. Kinney's deposition (Rec., 44 *et seq.*) shows that he is justly chargeable prior to September 13, 1870, with money collected by him belonging equally to Skiles & Western....................	$4,520 70
He will not expressly admit, but does not deny, four items of this, aggregating.........	1,065 00
Leaving amount expressly admitted......	$3,455 70
He shows by leaf taken from his old account book (Rec., 27) that he is entitled to credits for money laid out for Skiles & Western jointly..	$57 70
He also claims, on his oath, an additional item, which is not found on his account book, against them jointly for surveying (Rec., 29)...........................	32 00
Balance due Skiles & Western jointly from Kinney before the $102.50 and the $150 and interest was collected from Thayer by J. F. Kinney's brother (September 13, 1870) and by Kinney himself (July or August, 1871)...........	$3,366 00

Western's half of this balance on September 12, 1870, was....................	1,683 00
Amounts advanced and paid over to Western and wife, according to leaf from Kinney's old account book (Rec., 27), due bills, &c...	815 00
He claims an additional specific item not found on his account book	500 00
Balance, without interest, due Western prior to September 13, 1870..............	$368 00

Therefore, neither Western, his heirs, or representatives, derived any benefit from the pretended payments to *W. C. Kinney*. Even if Western had been indebted to Kinney, it would not have been lawful for the latter to seize upon Western's estate, or any part thereof, and apply to his own debt without the intervention of an administrator; and such action on his part would not have protected him against a demand on the part of a legally-constituted administrator or executor of Western to recover the property so seized and converted by Kinney.

Bartlett v. *Hyde, 3 Mo., 490 ;*
Hastings v. *Myers, 21 Mo., 519 ;*
State v. *Moore, 18 M. A., 406 ;*
Costetphens v. *Dean, 69 Ala., 385 ;*
Flush v. *Gresham, 36 Ark., 529 ;*
Harwood v. *Marye, 8 Cal., 580 ;*
Taber v. *Packwood, 1 Day, 150 ;*
Roorbach v. *Lord, 4 Conn., 347, 349 ;*
McCord v. *Fisher, 13 B. Mon.* (*Ky.*), *190, 195 ;*
Leman v. *McCubbin, 82 Ill., 263 ;*
Carr v. *Hewitt, 73 Ind., 378 ;*
Conference v. *Miles, 36 Ind., 375 ;*
Lenord v. *Blair, 59 Ind., 510 ;*
Haines v. *Harris, 33 Iowa, 516 ;*
Bayard v. *Brooks, 65 Iowa, 40 ;*
Hagthorp v. *Hook, 1 Gill & J.* (*Md.*), *270, 294;*

Lawrence v. *Wright, 23 Pick., 128 ;*
Hall v. *Burgess, 5 Gray, 12, 16 ;*
Marshall v. *King, 24 Miss., 85, 91 ;*
Browning v. *Watkins, 10 Sm. & M., 482, 485 ;*
Tappan v. *Tappan, 30 N. H., 50, 68 ;*
Beecher v. *Crouse, 19 Wend., 306 ;*
Whit v. *Ray, 4 Ired. L., 14 ;*
Davidson v. *Potts, 7 Ired. Eq., 272 ;*
Allen v. *Simmons, 1 Curt.* (*R. I.*), *122.*
Bradford v. *Felder, 2 McCord Ch.* (*S. C.*), *168, 169 ;*
Smiley v. *Bell, Mart. and Yer.* (*Tenn.*), *378 ;*
Alexander v. *Barfield, 6 Tex., 400, 404 ;*
Cocoran v. *Thompson, 18 Tex., 652, 655 ;*
Murphy v. *Hanrahan, 50 Wis., 455, 490.*

We insist that Skiles, by his letter of April, 16, 1870—to which special attention is asked (Rec., 41–2)—*revoked* any verbal authority he may have given Kinney even to sell the lot in question; the sale of the lot to Thayer was on June 13, 1870, nearly two months after the letter above referred to. In his note to Kinney of January 27, 1871, Skiles says *that he told William Newcomb that the lots were not on the market.* (*Rec., 43.*)

As the lots were only twenty-five feet front, it necessarily followed from the nature of the property, which was the subject-matter of the agency, that the death of one principal revoked the authority given by each principal, because no man could ordinarily make use of an undivided half interest in a town lot of twenty-five feet front.

The power of attorney from Western to Kinney (Rec., 46) does not, in express terms, authorize him to receive payment; neither does the verbal authority from Skiles, as proved by Kinney (Rec., 23). That power, if it existed at all, must be made out by necessary implication as an incident of the power to sell. Therefore, when the principal power—the power to sell—was destroyed by Western's death, the incident—the power to receive payment—was also necessarily gone.

> "*Every principal thing draws after itself its incident.*"
> *Green* v. *Hart, 1 Johns., 580, and cases cited;*
> *Parsons* v. *Welles, 17 Mass., 425.*

The deed executed by the Western heirs, June 9, 1887, to Long warranted the title to him (Rec., 59).

The rents of the property in question for many years, while the Western heirs were minors, more than reimbursed appellee. He gave for the lot $302.50 (Rec., 16); improvements cost him $475.00 (Rec., 21); total, $777.50. Total rents, without interest, $2,280.00. (See depositions of Thayer and Evans, Rec., 21, 35, putting average monthly rent at about ten dollars.)

So that appellee's clear profit on the transaction would be about $1,502.50, not counting any interest on the rents in the meantime, notwithstanding the decision of this suit in favor of appellant.

Failing on the issue joined, the court below was asked to abandon all principle, precedent, and practice, and to make a decision on a case not in the pleadings, nor in the evidence, and hence not before the court; that is, to treat the case as if Thayer had alleged that he had been always ready, willing, prompt, and eager to pay, instead of alleging a state of facts antagonistic to that position, as he has done, namely, that he had already made actual payments. Appellant was given no notice that he was to defend the case now contended for in the argument. It is a different case from the one alleged in the bill. The authorities relied on for Thayer merely announced, in broad terms, the general powers of a court of equity, presupposing or assuming a proper case, made by proper pleadings. But neither a court of equity nor a court of law has power to make a decree outside of the case made by the pleading, and if an attempt should be made so to do the judgment or decree would be a nullity.

Carneal v. *Banks, 10 Wheat., 181;*
Crockett v. *Lee, 7 Wheat., 552;*
Graham v. *R. R. Co., 3 Wall., 704;*
Muenks v. *Bunch, 90 Mo., 501;*
Gregory v. *Powell, 3 Litt., 339;*
Ringold v. *Ringold, 1 Harr. and J., 11;*
Pigg v. *Corder, 12 Leigh, 69;*
Cloud v. *Whiteman, 2 Harring, 401;*
Maury v. *Mason, 8 Porter, 211;*
Smith v. *Smith, 1 Ired. Ch., 83;*
Langdon v. *Roane, 6 Ala., 518.*

It is true, that it sometimes happens, a bill by its allegations makes a proper case for equitable relief, and yet the appellee has failed in his prayer for specific relief to ask for that relief for which he is entitled according to his allegations; and it is also true, that in such a case the relief to which he is entitled, according to the allegations of his bill, is frequently granted to him under the prayer for general relief. The case at bar is not one of that class. But even if it were, the relief so granted must always be consistent with the case made by the allegations of the bill; it must be appropriate to the facts alleged; it must be the relief called for by the case and the issue made. No relief, except such as is agreeable to the case made by the bill, can be granted.

1 Dan., Ch. Pr. (5th ed.), 378 to 384, and note;
Boone v. *Chiles, 10 Pet., 177;*
Foster v. *Goddard, 1 Black, 506;*
Barnes v. *Chicago, &c., 122 U. S., 1.*

It can not for a moment be contended that the case made by the bill is that of a vendee ready, willing, prompt, and eager to pay the balance of the unpaid purchase money. That is a new and antagonistic case to the one alleged in the bill.

There was no application before the court for leave to amend the bill so as to make it allege readiness to perform instead of actual performance, and if there had been it could not be allowed, because such an amendment would have been directly in the teeth of, and contradictory to, the allegations already made, and not only made, but *sworn* to. Were the rule otherwise the crime of perjury would be at a premium in courts of conscience.

Rogers v. *Rogers, 1 Paige, 424;*
Whitmarsh v. *Campbell, 2 Paige, 67;*
Verplank v. *Merchants' Ins. Co., 1 Edw., ch. 46;*
Altree v. *Horden, 3 Lond. Jurist, 81;*
Prescott v. *Hibble, 1 Hill, ch. 217;*
Carey v. *Smith, 11 Geo., 570;*
Shields v. *Barrow, 17 How., 130.*

Thayer makes a poor explanation of his laches in this case, taking his own testimony in its strongest light (Rec., 20), and he makes no offer whatever, even in his complaint to place Long in as good a position as before; he shows no readiness or willingness to pay his indebtedness, and that, too, after buying up a title adverse to the contract here involved, which he could not in equity do. The position of Thayer is, in effect really, to rescind the contract and quiet his title acquired from Benson & Sons, making no offer to make Long *whole*, as the cases say; he offered not to do equity in any particular. Indeed, it was with tardiness, if not reluctance, he agreed to confess judgment in the ejectment suit. He could not buy this outstanding title for himself alone, that is clear.

Galloway v. *Finley, 12 Pet., 295;*
4 Kent Com., 369, and cases cited;
Van Horne v. *Fonda, 5 J. C. R., 407;*
Dickinson v. *Codwise, 1 Sandf. Ch., 226, and cases cited;*
Bush v. *Marshall, 6 How., 288.*

It is hardly possible for the court to relieve Thayer, since he offers not to reinstate Long, and especially after so long a delay unexplained. Such is the doctrine of Lord Hardwicke in *Rose v. Rose, Am., 332.* See also *Davis v. West, 12 Ves., 475, and Davis v. Tarwater, 15 Arks., 295–6,* where many cases are reviewed and applied.

Hollingsworth v. *Fry, 4 Dall., 345.*

Applying these familiar principles of equity to the present case, Thayer has as little standing in a court of conscience, on his own showing by his complaint and on his own testimony, as any man who ever tried to invoke its aid.

It is to be admitted the jurisdiction in this case attaches regardless of citizenship appearing on the Record, as this suit was brought not as an original one, but ancillary and dependent, supplementary merely to the original suit of ejectment.

Freeman v. Howe, 24 How., 460, and cases cited;
Johnson v. Christian, 125 U. S., 642, and cases cited.

And upon the case before the court, the decree below is asked to be reversed, and Long be permitted to execute his judgment in ejectment.

A. H. GARLAND,
H. J. MAY,
For Appellant.

Office Supreme Court U. S.
FILED.
NOV 27 1893
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

TERM No. 748.
DOCKET No. 471.

FRED H. LONG,
Appellant.
vs.
JAMES G. THAYER,
Appellee.

STATEMENT AND BRIEF FOR APPELLEE.

P. E. HATCH,
R. B. MIDDLEBROOK,
WM. A. McKENNEY,
For Appellee.

KANSAS CITY:
TIERNAN-HAVENS PRINTING CO., PRINTERS AND BINDERS.
1893.

IN THE

Supreme Court of the United States

TERM No. 748.

DOCKET No. 471.

FRED H. LONG,
Appellant.
vs.
JAMES G. THAYER,
Respondent.

All References are to Top Pages of Printed Copy of the Record.

STATEMENT FOR JAMES G. THAYER, APPELLEE.

James G. Thayer bought land of W. W. Western and H. H. Skiles, as evidenced by contract. This contract was in writing, and appears on page 2 of the record.

Thayer complied with its terms in every respect, but when he made the last payment Western had died, and Thayer made such last payment to Kinney (Western's and Skiles' agent) after Western's death, though informed by Kinney at the time he (Thayer) handed over the money to Kinney that Western had died (p. 20, record). This last payment made by Thayer on the contract was made July 13, 1871, over twenty-two years ago.

Thayer went into actual possession of the land in June, 1870 (p. 16, record), and at once erected a frame cottage and usual out-buildings and improvements, and has remained in actual possession of the premises ever since then, and is in possession thereof *now*.

On June 9th, 1887, the two surviving heirs of Western—*i. e.*, Lucy U. Western and Elgin U. Western—who had become of age, made a warranty deed of the land to Fred H. Long, the appellant.

The widow of Western, in July, 1885 or 1886, married Long,—see E. U. Western's testimony (page 63, record)—who thus became step-father to the Western heirs, and was occupying that relation towards them in June, 1887, when they deeded the land to him.

Long immediately after he procured this deed from his step-children brought a suit in ejectment against Thayer's tenant, one Townsend R. Smith, in the Federal Court in Western Missouri, to recover the possession of the land. Thayer discovered this suit, and on his own motion was made a party defendant. He set up an equitable defense to the ejectment suit, (page 55, record) which, under the rules and practice of the Federal Court, was overthrown. He then applied for, and obtained, an injunction to restrain Long from further prosecuting his ejectment suit. This injunction was sustained conditionally, which conditions Thayer has complied with by paying his money into court as directed. (See p. 14, record, final decree of Judge Brewer.) During all the years in which the heirs of Western were minors, there is no evidence to show whether there was any administrator or executor of Western's estate, or any guardian of the persons or estate of his minor heirs, appointed or acting, capable of receiving payment from Thayer. No question is raised as to Skiles having died.

Skiles' interest became vested in Western by virtue of a partition suit and litigation over the title to the land in question, to which litigation Thayer was never made a party. These partition proceedings occurred in 1873 (p. 8 of record). Thayer had already paid the last payment, to-wit, August 14, 1871. (See p. 53, record.)

BRIEF.

Long (appellant), is not an "innocent purchaser," and is entitled to none of the benefits to be derived from such a status.

Because:

1st. The testimony shows (p. 63 to 68 and p. 69 to 72, record) that Long, in 1885 or 1886, married Mr. Western's widow, thereby becoming the step-father of the Western heirs, which relation he occupied when said heirs made the deed to him, June 9th, 1887, on the strength of which deed he bases his claim as an innocent purchaser for value. It also appears, from the record (same page), that Mr. Meriwether, counsel for Long, is the husband of Lucy Western (one of the said heirs), and that he acted as attorney, both for Long and the Western heirs, in securing the conveyance from the heirs to Long of the land in question, and in examining the abstract of title to the land.

That the consideration in the deed from the Western heirs to Long was $4900. No cash, simply a promissory note, *unsecured by mortgage or deed of trust, on the land sold.* That the heirs never saw the note or paper or money, and did not know whether the note was secured or not (and E. U. Western, one of the heirs, is a lawyer), and, in fact, that Mr. Meriwether managed the whole transaction for both buyer (Long) and the sellers (Mrs. Meriwether, his wife, nee Western, and her brother, E. U. Western). (See depositions of the heirs, E. U. Western and Mrs. Lucy

Meriwether, nee Lucy U. Western, p. 63 to 68, and p. 69 to 72 record.) These circumstances surround the transaction and are to be considered with it.

Eck vs. Hatcher, 58 Mo., 235.
Vaughn vs. Tracy, 22 Mo., 415.

2nd. Because, The open, notorious, unequivocal, adverse, possession of Thayer and his building improvements and renting the premises, paying the taxes, and that this condition of things existed at the time Long got his deed from his step-children, are patent facts, which Long alone has seen fit to innocently ignore. (See Thayer's testimony, p. 16, record.) This kind of possession was notice to Long, at least enough so to put him on enquiry. He had no right to shut his eyes and ears and then announce himself an innocent purchaser. He was guilty of voluntary ignorance.

Eck vs. Hatcher, 58 Mo., 235.
Vaughn vs. Tracy, 22 Mo., 415.
Drey vs. Doyle, 99 Mo., 459.
Brown vs. Volkewning, 64 N. Y., 76.
Noyes vs. Hall, 97 U. S., 34.
Wade on the Law of Notice, 2nd edition, Secs. 275, 276, 277, 278 and 279.
Kent's Commentaries, Vol. IV., pp. 179 and 180.
Wright vs. Wood, 23 Pa. State, 120.
Bogue vs. Williams, 48 Ill., 371.
Landis vs. Brant, 10 How. U. S., 348.

3rd. Because, Mr. Meriwether was the agent and attorney for both grantors and grantee in the deed from Western heirs to Long. Western, one of the heirs, testifies that Meriwether advised the heirs to deed to Long on account of Thayer's doings. (Pp. 66 and 67, record.)

Knowledge to agent or attorney is knowledge to principal, and Mr. Meriwether's knowledge was, in law, Mr. Long's knowledge.

> Wharton on Agencies and Agents, edition of 1876, Sections 177, 584, 673, and cases there cited.

4th. Because, The contract of purchase of the land in question was recorded in the proper office in Jackson Co., Missouri, by Thayer, April 12th, 1875. (P. 53, record.) Long got his deed from the Western heirs June 9th, 1887. (P. 59, record.) For over twelve years this contract was of record before Long got his deed, from the Western heirs. Though this contract was defectively acknowledged or not acknowledged at all, it became constructive knowledge to Long from the time the Revised Statutes of 1879 of the State of Missouri, went into effect; *i. e.*, from 1879 to 1887, Long had knowledge from the records, in the Recorder of Deeds' office at Jackson County, Missouri, of Thayer's contract. See Sec. 2305 Revised Statutes of Missouri of 1879 as follows: "What records impart notice." "The records, heretofore, *i. e.*, before 1879, (Thayer recorded his contract in 1875) made by the recorder of the proper county by copying, from any deed of conveyance, deed of trust, mortgage, will, or copy of a will, *or other instrument of writing, that has neither been proven nor acknowledged, or which has been proven or acknowledged, but not according to the law in force at the time the same was done, shall hereafter,* (*i. e.* after 1879) impart notice to all persons, of the contents of such instruments, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice thereof."

This section construed by the Supreme Court of Missouri.

Gatewood vs. Hart, 58 Mo., 261.

Since that decision the statute has been reenacted and broadened (R. S. 1879, Sec. 2305) by the insertion of the words "*or other instrument of writing;*" thereby bringing the contract between Thayer and Skiles and Western within its purview. No other change has been made in it. It has been very broadly construed as late as 1891. See Wells vs. Pressy, 105 Mo., 181, local citation.

The registry acts of Missouri apply to equitable as well as to legal instruments affecting real estate, and to contracts not under seal as well as to sealed instruments or technical conveyances.

McClury vs. Phillips, 57 Mo., 214.

The Revised Statutes of Missouri of 1879 (the law in force there when Long got his deed from the Western heirs, in 1887) also contains the following provision:

Sec. 2310, R. S. Mo., 1879:

"Execution of deed, what evidence of: Whenever the records in the recorder's office of deeds, of any county, shall contain a record of any *writing, instrument, or deed*, purporting to affect any real estate, or any right or interest in or to the same, and such real estate, right or interest, in or to the same, shall have been claimed or enjoyed by any person by or through such writing, instrument, or deed, for a period of ten consecutive years, such writing, instrument, or deed, and a certified copy thereof, and of the time of its record, shall be prima facie evidence of the execution of such writing, instrument, or deed, and of its genuineness and time of record, provided the said record thereof shall have been made at least ten years next before such writing, instrument, or deed, or certified copy thereof, is offered in evidence."

See this statute construed.

Hoge vs. Hubb, 94 Mo., 489.

Also, Sec. 3813 R. S. Mo., 1879, as follows:

"What shall be recorded: It shall be the duty of the recorders to record: *First*, All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances *or other instruments of writing of or concerning* any lands and tenements, or goods and chattels, which shall be proven or acknowledged according to law, and authorized to be recorded in their offices."

The whole sum and substance of this case is that the appellants are claiming a forfeiture because, they say, Thayer did not make his last payment in exact accordance with the rules of law.

This is the wrong Court in which to present such a defense.

> Story's Equity Jurisprudence, 12th edition, Secs. 1311, 1312, 1315, 1316, 1323. Notes and cases cited.

"The other party" (Long) under the terms of Judge Brewer's decree (p. 14, record) not being an innocent purchaser, as heretofore plainly shown, and not being so regarded by the learned judge, who heard the evidence, stands in the shoes of the Western heirs, and the Court can put them in as good condition as if Thayer's agreement had been performed literally. This was done by Judge Brewer's decree directing Thayer to pay his last payment over again with interest, at ten per cent. per annum, from June 13th, 1870. This phase of the law is discussed by Lord Hardwicke, in Rose vs. Rose, Amb. 332. Also, Willard's Equity Jurisprudence, edition of 1863, Chap. 1st, p. 56.

This decree providing for the paying into Court of the last payment and interest over again, is a practical application of the correct theory of Courts of Equity.

> Snell's Principles of Equity, 1st Am. edition from the 6th Eng. Ed., by John D. Lawson, pages 309 and 310.

This is a sufficient punishment to Thayer for his ignorance of the law in making a payment after the death of Western to agent Kinney, and equity will be satisfied with this.

It is claimed Thayer was guilty of laches; the evidence shows this to be untrue. (Thayer's testimony, pages 18 and 19 record.)

It is claimed Thayer forfeited his rights by buying a tax title. His testimony as to that transaction entirely negatives any such theory. (Thayer's testimony, page 20 record; city tax deed to Thayer, p. 60 record.)

Benson & Sons had bought the real estate in question for delinquent taxes and had received a certificate of purchase therefor. Thayer bought this certificate from them simply to protect himself, as otherwise they would have obtained a tax deed from the city at the expiration of two years from the time they received the certificate of purchase, and there is no evidence of any collusion between Benson & Son and Thayer.

The decision and decree of the court below was correct and should be affirmed.

P. E. HATCH,
R. B. MIDDLEBROOK,
WM. A. McKENNEY,
For Appellee.